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In the Matter of: :
1982 and 1983 JUKEBOX :
ROYALTY DISTRIBUTION : Docket No. 83-2 and
No. 84-283JD
PROCEEDINGS :

- - - - - X

(This volume contains pages 1 through 168)

Room 458
1111 20th Street, Northwest
Washington, D. C.

Monday, September 30, 1985

The hearing in the above-entitled matter was
convened at 10:00 a.m., pursuant to Notice.

BEFORE:

EDWARD W. RAY	Chairman
MARIO F. AGUERO	Commissioner

1 APPEARANCES:

2 ASCAP:

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C O N T E N T S

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P R O C E E D I N G S

(10:00 a.m.)

CHAIRMAN RAY: Good morning.

Today we begin the consolidated proceedings for the 1982 and 1983 Juke-Box Distribution Proceedings. We will begin with the direct case for ASCAP, BMI and SESAC. Before we start, I would like for each party to introduce themselves for the Reporter, please.

MR. EISEN: My name is Bruce Eisen, I represent ACEMLA in this proceeding. That is Asociacion de Compositores y Editores de Musica Latinoamericana. And I apologize if I didn't pronounce it quite right.

MR. KOENIGSBERG: I am Fred Koenigsberg, and I am counsel for ASCAP, here jointly with my co-counsel for ASCAP, BMI and SESAC. And a bit later on, Mr. Chairman, we will introduce all the folks who are here with us today.

MR. DUNCAN: I am Charles T. Duncan, counsel for BMI, and co-counsel with Mr. Koenigsberg and the Music Claimants jointly.

MR. ARCOMANO: I am Nicholas Arcomano, counsel for SESAC, Inc.

CHAIRMAN RAY: Thank you.

MR. Koenigsberg, do you have any opening remarks?

MR. KOENIGSBERG: Yes, Mr. Chairman, thank you very much.

1 First, let me, as I just mentioned, tell you who
2 some of the folks with us today are. You all know my
3 colleague, Beverly Willett; and of course, you know ASCAP's
4 General Counsel, Bernard Korman. And joining us today,
5 also, are ASCAP's former Chief Economist, Dr. Paul Fagan,
6 whom you know well; ASCAP's current Chief Economist, Peter
7 Boyle, and Barry Knittel, who is ASCAP's Director of National
8 Sales for General Licensing, and therefore is very much
9 concerned with the jukebox questions before us today.

10 Let me turn to my co-counsel, Mr. Duncan, so he
11 may do likewise.

12 MR. DUNCAN: Yes, from Reid and Priest, you
13 know my colleagues, Mike Faber and Lisa Powell, they have
14 been here before. From BMI, Ted Chapin, who is Vice
15 President and General Counsel, you have met him before.
16 Allen Smith, Vice President for Administration, you have
17 met Mr. Smith before. Ron Anton, Vice President, California,
18 who will be a witness, and Frances Preston, who is Senior
19 Vice President with Performing Rights, and this is Mrs.
20 Preston's first time here, is that right?

21 MR. KOENIGSBERG: Mr. Chairman, let me also add
22 that this is a joint presentation of ASCAP, BMI and SESAC,
23 and we have witnesses who are here from ASCAP and from
24 BMI. Do not be disturbed that we have no witnesses from
25 SESAC. You do know that in the papers that we have

1 presented to you in the past in this proceeding, SESAC
2 has been very much a part of our case, and please don't
3 overlook that.

4 Mr. Chairman, what we will be doing for you today
5 --

6 CHAIRMAN RAY: Excuse me, before you start with
7 that. Do you have any statement for the record to make
8 regarding Italian Book?

9 MR. KOENIGSBERG: Mr. Chairman, I can say only
10 this, I have had discussions with Mr. Angel, who is
11 counsel for Italian Book Company, as I believe Mr. Eisen
12 has. Mr. Angel has told me that all counsel have agreed
13 to a stipulation in principle, stipulating Italian Book
14 Company out.

15 We have circulated a written stipulation to that
16 effect. Sadly, I have not yet heard from Mr. Angel as to
17 whether that stipulation has been executed. It is in the
18 form that would be presented to the Tribunal, much com-
19 parable to the stipulation that was done for National
20 Public Radio in the currently pending Cable Distribution
21 Proceedings. But I have not yet heard back from Mr. Angel,
22 though I tried to reach him, the hurricane, I think,
23 interfered with the telephones.

24 So, I cannot say to you, sir, that Italian Book
25 Company is agreed to be out of the proceedings formally yet,

1 but my understanding is that, in principle, they are. And
2 perhaps Mr. Eisen can enlighten us from his point of view
3 as well.

4 MR. EISEN: At this time, Mr. Chairman, I can
5 only state that not only have I not seen the stipulation
6 that Mr. Koenigsberg referred to, although I certainly
7 look forward to seeing it when it is received, I have had
8 one discussion with Mr. Angel over the last month, perhaps.

9 I am unaware of any agreement in principle, al-
10 though it is certainly true he discussed with me the
11 prospect of his client dropping out of this proceeding.
12 More than that, I simply can't say, because I have seen
13 no written documentation to that effect.

14 CHAIRMAN RAY: Thank you.

15 MR. KOENIGSBERG: Mr. Chairman, I would simply
16 add that my statement to that effect was based upon
17 representation that Mr. Angel had made to me.

18 Let me proceed then, if I may, sir, to a very
19 brief opening remarks.

20 Through our witnesses today, Mr. Chairman, we
21 are going to be doing two things, I think. First, we shall
22 be introducing evidence which proves affirmatively to you
23 the entitlement of ASCAP, BMI and SESAC to virtually
24 everything in the 1982 and 1983 Jukebox funds. We shall
25 also introduce evidence, Mr. Chairman, going to the question

1 of the entitlement of the Latin American music groups which
2 are now before you under the heading of ACEMLA. And we
3 believe the evidence we are going to introduce through
4 our witnesses' testimony will show you that they are
5 entitled, if to anything at all, and we think there is a
6 serious question as to that, to almost nothing out of the
7 funds.

8 We would also stress to you, Mr. Chairman, and
9 Commissioner, that there is a very important issue before
10 you in these proceedings, that issue is the question of
11 whether this entity is a performing rights society, or
12 not. It is our belief that they have not proven that they
13 are. It is our belief that they are not.

14 And, indeed, given the filings that have been
15 made, we think that there is a very good legal question,
16 as well as a factual question as to whether they are
17 therefore entitled to any award from the Tribunal at all.

18 That having been said, Mr. Chairman, let us turn
19 to our direct case, and our first witness will be Gloria
20 Messenger.

21 MR. EISEN: Mr. Chairman, I would ask your
22 indulgence for just a moment, please. I promise not to
23 interpose many objections , but moments like this -- I am
24 not as familiar with the Tribunal as counsel is, and I
25 know that that doesn't entitle me to any special

1 dispensation, but I would like to, if I may, just very
2 briefly, and before the direct case of Mr. Koenigsberg is
3 put into the record, clarify for my own purposes, and
4 possibly for the Tribunal's, too, some of the procedures
5 that are going to be used.

6 Would it be appropriate to address that at this
7 point?

8 CHAIRMAN RAY: Yes. Do you have anything
9 specific?

10 MR. EISEN: Yes, just a couple, and I will be
11 brief.

12 I have received precious little information from
13 the Tribunal itself. I did, of course, receive the
14 communication last week concerning the time and the place
15 of the hearing, and the statement in that release that it
16 will be spread over three specific days this week.

17 Mr. Koenigsberg was good enough to call me a
18 couple of weeks ago with some further information, insofar
19 as the order of presentation was concerned. I certainly
20 have no reason to doubt Mr. Koenigsberg's good faith in
21 providing me with that information. One of the things
22 that I would like to clarify is my recollection, and Mr.
23 Koenigsberg's statement to me -- and, again, none of this
24 was placed in writing by the Tribunal, or for that matter
25 by Mr. Koenigsberg -- as to the way this proceeding would

1 be spread out over this week. For instance, is it my
2 understanding that the joint presentation will be placed
3 on today, that is the direct case?

4 CHAIRMAN RAY: Yes, if we can conclude it today.

5 MR. EISEN: Okay. Does that mean that there has
6 been a certain amount of time that has been allotted to
7 the BMI presentation on Wednesday, and then for my pre-
8 sentation on behalf of ACEMLA on Thursday, or is it
9 possible that we are going to spread, if it can be con-
10 solidated more quickly, these direct cases, in a shorter
11 amount of time?

12 CHAIRMAN RAY: We would like, if possible, and
13 we will entertain any motion for any counsel for con-
14 solidation, if it will speed up the proceedings.

15 I might add, we are a little flexible in our
16 proceedings in cases like this, in order to accommodate
17 and also to conclude the hearings as quickly as possible.

18 MR. EISEN: Let me just raise two further --

19 MR. DUNCAN: Mr. Chairman, on this point, if I
20 may observe, so counsel doesn't misunderstand. ASCAP, BMI
21 and SESAC, subject to the length of cross-examination,
22 will conclude their case today.

23 CHAIRMAN RAY: Hopefully.

24 MR. EISEN: Okay, that was not my understanding,
25 my understanding had been that BMI was going to present

1 their direct case on Wednesday. I see already people in
2 the gallery shaking their heads. Have I not gotten that
3 correct?

4 MR. DUNCAN: Yes, subject to cross-examination,
5 the direct case of the Music Claimants will be put on today.

6 MR. EISEN: Is that your understanding, too, Mr.
7 Chairman?

8 CHAIRMAN RAY: Yes, it is. Will that pose any
9 problem for you?

10 MR. EISEN: Well, it may pose a problem, at least
11 insofar as BMI's presentation is concerned. I can't
12 imagine, frankly, and this is subject to what happens here
13 in the presentation -- that the joint showing by ASCAP
14 and SESAC can't be concluded today. In fact, possibly
15 before midafternoon, it is conceivably, depending on how
16 much time we take for a lunch break.

17 However, I think perhaps it will be best simply
18 to see where we go. I do have some problems based on my
19 understanding, prior to this morning, about when the BMI
20 case would be placed on.

21 CHAIRMAN RAY: Have you had an opportunity to get
22 in touch with our General Counsel in the last week or so?
23 I have been unavailable for the past --

24 MR. EISEN: Not within the last week. I had
25 talked to the General Counsel in the past, and he has been

1 very helpful, not with regard to this specific matter.

2 CHAIRMAN RAY: I see.

3 Well, why don't we proceed and then maybe when
4 we take our noon recess, we will discuss it off the record
5 again, and see what we can do.

6 MR. KOENIGSBERG: Mr. Chairman, just for counsel's
7 enlightenment and the Tribunal's, our anticipated order of
8 presentation of witnesses today is Ms. Messenger, Mr. Anton,
9 Mr. Adler and Mr. Smith.

10 ASCAP and SESAC are not presenting separate
11 witnesses, nor is BMI. We have a joint case. And I just
12 asked Mr. Duncan -- Mr. Duncan's recollection and mine,
13 and I think it is an honest misunderstanding here, perhaps,
14 between ourselves and Mr. Eisen, but when we spoke with
15 Mr. Eisen a few weeks ago about the presentation, I had
16 thought, and I believe Mr. Duncan had thought, that we
17 were clear that we were putting on all of our witnesses
18 today, in the hopes of concluding our presentation by the
19 end of the day today, for the convenience of the Tribunal,
20 and all of the parties concerned.

21 I am sorry if that didn't come through.

22 MR. EISEN: Perhaps that is one of the problems
23 -- I am not going to claim any special dispensations -- I
24 am perfectly willing to go along and see how we go. But
25 I do have a couple of other procedural matters that I would

1 like to raise.

2 First of all, I am unclear as to SESAC's status
3 in this proceeding. I recognize that they are in effect,
4 and if somebody wants to come down on me for using the
5 wrong word "boot strapping their case" on BMI and ASCAP,
6 their showing at least on ASCAP's showing, you can take
7 issue with that, too.

8 But in light of the fact that we are talking
9 about a fund that the Tribunal, and indeed, Congress has
10 aggregated, you say it is 5 percent, and I would also like
11 to address that for just a second. I don't understand
12 why SESAC is able to become part of this joint showing, if,
13 indeed, they are not going to make a separate showing as
14 to entitlement to any of these funds. I would just like
15 to raise that and see how it is addressed.

16 MR. ARCOMANO: Fred, if you want to answer it,
17 but I just want to make it clear that we are not "boot
18 strapping" on ASCAP or with BMI. We have made a long-term
19 agreement with ASCAP and BMI, and we have given ASCAP and
20 BMI evidence of our share, basically, our representation
21 of Latin American music.

22 MR. KOENIGSBERG: Mr. Chairman, if I may be heard
23 on that, too.

24 CHAIRMAN RAY: Yes.

25 MR. KOENIGSBERG: I do take vehement objection

1 to the use of the word "boot strapping" for SESAC's
2 participation in these proceedings. I do realize that Mr.
3 Eisen has not previously participated in prior Tribunal
4 proceedings, but the Tribunal in virtually every proceeding
5 that I know of, has allowed, indeed encouraged joint cases.

6 And the reason the Tribunal has done so, certainly
7 in this case, is because of the language of the Copyright
8 Statute, which states -- and let me find the exact reference
9 for you -- Section 116(c)(2), "Notwithstanding any pro-
10 visions of the Anti-Trust laws for purposes of this sub-
11 section, any claimants may agree among themselves as to
12 the portion provision of compulsory licensing fees among
13 them, may lump their claims together and file them jointly,
14 or as a single claim, or may designate a common agent to
15 receive payment on their behalf".

16 And I would also add, Mr. Chairman, in Section
17 116 (e)(3) in the definition of a performing rights society,
18 ASCAP, BMI, and SESAC are all explicitly recognized.

19 MR. EISEN: I don't dispute that, Mr. Chairman
20 and Commissioner Aguero. That doesn't necessarily mean,
21 however, that any party is necessarily in the position to
22 prove entitlement. I certainly don't argue with the fact
23 that SESAC is congressionally named as a performing rights
24 society, but if there is going to be an affirmative case
25 that shows that SESAC should, in fact, share in this fund,

1 I think it is incumbent upon counsel to put affirmative
2 evidence into the record to show that they, indeed, are
3 indeed entitled to share.

4 MR. ARCOMANO: I think we have put evidence in
5 the record, and I think the CRT is aware of that from the
6 direct case of ASCAP, BMI and SESAC, when we have submitted
7 our portion of the direct case. We have provided evidence
8 in that portion of the direct case.

9 The fact that ASCAP and SESAC have a separate
10 joint statement, and BMI may have another statement doesn't
11 in anyway lessen the impact of the evidence that we have
12 produced.

13 CHAIRMAN RAY: This will be the last comment at
14 this time on this particular point.

15 MR. EISEN: I don't disagree with counsel's
16 analysis of having put evidence into the direct case on
17 behalf of SESAC, but my understanding is that SESAC is not
18 sponsoring any witnesses to support any evidence that they
19 are putting in the record.

20 And, again, if that is the case, I have problems
21 with them sharing in this aggregate that is being sought
22 by the joint direct case.

23 CHAIRMAN RAY: What is your other procedural
24 problem -- you said you had another one?

25 MR. EISEN: I do, and this comes from ignorance,

1 and nothing other than that.

2 When a witness is placed on the stand, is counsel
3 simply going to address questions to the witness, is she
4 going to testify as to her direct case exhibit? Are we
5 going to have an opportunity before cross-examination
6 begins to discuss some of the portions of that individual's
7 direct case that may, for one reason or another, not be
8 relevant, and perhaps should not travel with the record in
9 this proceeding at all?

10 CHAIRMAN RAY: Well, first of all, we do not have
11 in this particular hearing, the Jukebox, we have not
12 sent any pre-hearing procedures. There was no recommenda-
13 tions made by any counsel, therefore, we will follow the
14 precedent of past proceedings.

15 There will be an opportunity, prior to cross,
16 for any voir dire that you may have. Since we did not
17 give each party an opportunity, previous to the hearing,
18 to comment on relevancy. To a limited degree, we will
19 allow that, also.

20 Does that satisfy you?

21 MR. EISEN: If I hear you correctly, Mr. Chairman,
22 we will have an opportunity before cross-examination --

23 CHAIRMAN RAY: In those two areas only.

24 MR. EISEN: -- to object to portions of a witness'

25 --

1 CHAIRMAN RAY: For relevancy and voir dire.

2 MR. EISEN: I understand.

3 CHAIRMAN RAY: Any other comments?

4 MR. EISEN: Not at this time.

5 CHAIRMAN RAY: Thank you.

6 Ms. Messenger, once again we are very happy to
7 have you appear before us.

8 Whereupon,

9 GLORIA MESSENGER

10 was called as a witness and, having first been duly sworn,
11 was examined and testified as follows:

12 CHAIRMAN RAY: Mr. Koenigsberg.

13 MR. KOENIGSBERG: Thank you, Mr. Chairman.

14 DIRECT EXAMINATION

15 BY MR. KOENIGSBERG:

16 Q Would you state your name for the record, please?

17 A I am Gloria Messenger.

18 Q And would you state your current position, please?

19 A I am the Managing Director of the American
20 Society of Composers, Authors and Publishers.

21 Q And on whose behalf are you appearing before the
22 Tribunal today?

23 A I am appearing on behalf of the three performing
24 rights organizations, ASCAP, BMI and SESAC.

25 Q Ms. Messenger, would you please tell the Tribunal

1 something of your background, your education, your career
2 history, and the current responsibilities of the position
3 that you fill?

4 A Yes, I would be glad to. I should state that I
5 will not be referring directly to my written testimony, if
6 I may, I will make things a little briefer, if I don't
7 read my testimony. But to summarize, quickly, I was
8 graduated from Smith College, Yale Law School, I started
9 working at ASCAP as a green young lawyer, in 1955. I rose
10 to be Assistant General Counsel, I also was Managing
11 Distribution Manager at ASCAP. I had a specialty in the
12 distribution in survey areas, and in 1981, became the
13 Managing Director and the Chief Operating Officer, and
14 as such, I supervise the licensing activities of ASCAP,
15 the distribution functions; our relations with customers,
16 the public, members, and our relations with foreign
17 societies.

18 Q Ms. Messenger, do you have any corrections that
19 you would like to make to the written testimony that has
20 been put in?

21 A Yes, I do. If I may direct you to page 6, the
22 third full paragraph, the last paragraph on the page, the
23 third sentence, which says, "Of the 76 jukeboxes we looked
24 at, only -- and change 6 please to 5, or instead of 7.9,
25 6.6 percent had current certificates showing that they were

1 in compliance with the law.

2 And then in the next sentence, as well, there is
3 a change the number 64 should be changed to 65 jukeboxes,
4 and change 84.2 percent to 85.5 percent did not have
5 current certificates.

6 I believe those are the changes necessary.

7 MR. KOENIGSBERG: Mr. Chairman, Commissioner,
8 counsel, do you have those new numbers?

9 CHAIRMAN RAY: Yes.

10 MR. KOENIGSBERG: At this point, Mr. Chairman,
11 I think Ms. Messenger is available for any voir dire
12 questions.

13 MR. EISEN: I have no voir dire questions.
14 However, I do have some objections to the exhibit itself.

15 CHAIRMAN RAY: All right, what portions of the
16 exhibit?

17 MR. EISEN: At page one of Ms. Messenger's
18 statement, Section 2, the very first sentence. I would
19 object to the relevancy of that statement. I think whether
20 or not there has been a voluntary settlement in this
21 proceeding by one or more parties is irrelevant to the
22 question of entitlement; it has nothing to do with the
23 Court's remand order, and I would request that first
24 sentence be stricken.

25 CHAIRMAN RAY: I'm sorry, page 1.

1 MR. EISEN: Section 2 is entitled --

2 MR. KOENIGSBERG: Mr. Chairman, do you want to
3 hear comments on that?

4 CHAIRMAN RAY: Yes.

5 MR. KOENIGSBERG: It is a matter of record before
6 the Tribunal -- well, it is a matter of record before the
7 Tribunal that ASCAP, BMI and SESAC have reached a voluntary
8 settlement. And that statement is I think necessary
9 background for the Tribunal to understand the context of
10 Ms. Messenger's statement, as to the entitlement of ASCAP,
11 BMI and SESAC.

12 I don't really know how to respond to a statement
13 of that sort, but to say that I think that the point is so
14 obvious it virtually needs no response.

15 CHAIRMAN RAY: Do you have any comments?

16 MR. EISEN: Yes, counsel doesn't understand the
17 gravity of this objection. Of course it is a matter of
18 record, and that fact can be taken official notice of.
19 However, to the extent that it supports any question of
20 entitlement which is the only matter that this joint exhibit
21 must address, or to some extent the fact that my client
22 doesn't deserve entitlement, that statement is absolutely
23 relevant. The Court could do nothing with it, and neither
24 could this Tribunal.

25 CHAIRMAN RAY: The objection is overruled.

1 MR. EISEN: I would also object to the first
2 paragraph at the top of page 3 of the witness's statement.
3 Again, I think it is irrelevant to any of the remand orders
4 that the Court has presented the Tribunal with, and I don't
5 see how making a finding or a conclusion, based on that
6 statement could advance this hearing in anyway.

7 CHAIRMAN RAY: Comments?

8 MR. KOENIGSBERG: Yes, Mr. Chairman, the question
9 of why song writers and music publishers join ASCAP, BMI
10 and SESAC, and by implication would not join the entity
11 represented by Mr. Eisen, goes right to the heart of one
12 of the most important issues before the Tribunal, and
13 therefore, this statement is most relevant.

14 CHAIRMAN RAY: Do you have another comment?

15 MR. EISEN: My only comment is, in addition to
16 being irrelevant, it is wholly conclusary. It is not
17 supported by any factual evidence, or any exhibit. And
18 I, again, would request that it be stricken.

19 MR. KOENIGSBERG: Mr. Chairman, if I may be
20 heard on that. The factual evidence that supports it is
21 Ms. Messenger's many years experience in the performing
22 right area.

23 CHAIRMAN RAY: Any last comment?

24 MR. EISEN: No.

25 CHAIRMAN RAY: The objection is overruled.

1 MR. EISEN: At page 4, the second paragraph under
2 Section 3, again I would object for purposes of relevance,
3 conclusary statements with regard to ASCAP's endeavors in
4 Spanish-language music without supporting documentation
5 is irrelevant.

6 MR. KOENIGSBERG: Where were you again?

7 MR. EISEN: I'm sorry, the second paragraph on
8 page 4 of the statement.

9 MR. KOENIGSBERG: Mr. Chairman, the question of
10 representation of Spanish-language music is a question that
11 Mr. Eisen's clients themselves have raised before the
12 Tribunal.

13 If Ms. Messenger, who is the Chief Operating
14 Officer of ASCAP cannot testify as to the efforts ASCAP
15 and to her knowledge BMI and SESAC have made on behalf of
16 Hispanic members and affiliates, then this record will be
17 rather barren on an issue that Mr. Eisen's clients them-
18 selves have raised.

19 MR. EISEN: Mr. Chairman, Commission Aguero, it
20 is barren already, there is nothing in this direct testimony
21 to support that conclusion. And unless counsel is going
22 to ask further question on direct examination to elicit
23 this witness's response as to why it is that she is able
24 to make that statement, it is irrelevant. It is a conclusion.

25 How could any finder of fact make a conclusion

1 based on the last sentence in this paragraph, "I am sure
2 our friends at BMI and SESAC are also proud of their
3 efforts on behalf of their Hispanic affiliates"?

4 CHAIRMAN RAY: The Tribunal from time to time in
5 various proceedings, have allowed in what may be considered
6 irrelevant material, that under normal court would not
7 be allowed in. We make every effort to get as much informa-
8 tion, so that we optimally can make informed judgments.
9 We will determine what weight, if any, to give irrelevant
10 statements and material.

11 MR. EISEN: I'm sorry, I understood you to say
12 before I started this string of objections, that you would
13 entertain motions to strike based on relevancy. If your
14 position is --

15 CHAIRMAN RAY: Yes, we will entertain, but I am
16 just informing you that it has to be something that we
17 really feel is way left-field, in order before we will
18 entertain -- before we will sustain the objection. But we
19 certainly are not going to make decisions before we know
20 what the objections are.

21 So, this is why we give you the opportunity to
22 go through this.

23 MR. EISEN: Okay, I will continue these objections,
24 understanding also that part of your duties are going to be
25 to determine the weight of some of these matters which I

1 have already said were irrelevant.

2 CHAIRMAN RAY: Yes.

3 MR. EISEN: I do understand.

4 CHAIRMAN RAY: I just wanted to let you know that
5 you may continue, but we haven't voted on this issue.

6 Again, the objection is overruled.

7 MR. EISEN: I would object to the last paragraph
8 at page 6 of Ms. Messenger's statement. I don't believe
9 that whether or not a jukebox is licensed, or unlicensed,
10 has current certificates, or is devoid of certificates,
11 has anything to do with the issues that the Tribunal is
12 going to have to grapple with in this proceeding.

13 CHAIRMAN RAY: We agree with you that whether
14 it is licensed, or not is important for our determination,
15 but because of the difficulty this Tribunal has had in
16 getting any information on jukeboxes, we welcome any
17 information that we may receive regarding actual plays on
18 jukeboxes, and we will make the determination as to the
19 weight we give it.

20 But we do agree that as to whether the jukeboxes
21 are licensed, or unlicensed is immaterial. It is not
22 relevant for our final determination, but to delete the
23 entire paragraph it would, again, not provide us at least
24 another look at even a minimum number of jukeboxes -- some
25 information regarding jukeboxes.

1 Yes, sir?

2 MR. KOENIGSBERG: Mr. Chairman, I make two
3 observations, first, before the Tribunal finally decides
4 that issue, I point out to the Tribunal that no award could
5 be made for monies coming from jukeboxes for which monies
6 had not been paid. Obviously the monies that the Tribunal
7 has to distribute can come only from licensed jukeboxes.
8 There was a question, and it is raised in Ms. Messenger's
9 testimony as to whether there is any difference between
10 the performance of music on licensed versus unlicensed
11 jukeboxes. That is a question that we will have to put
12 before you and you will have to come to a conclusion on.

13 But in the best of all possible worlds, unlicensed
14 jukeboxes would be wholly excluded from any testimony
15 before you, since they have not paid any license fees.

16 I would also add, Mr. Chairman, that you should
17 make a little checkmark in the margin of Ms. Messenger's
18 testimony here, because of the point that counsel for
19 ACEMLA has raised. When we get to this point in Ms.
20 Messenger's testimony, perhaps we can go into the question
21 of what was performed on the licensed jukeboxes only, and
22 that will be enlightening for you, and perhaps for counsel
23 as well.

24 CHAIRMAN RAY: Any further comment?

25 MR. EISEN: Only by that does counsel imply that

1 counsel is going to go beyond the direct exhibit, or the
2 case that has been submitted in Ms. Messenger's statement?

3 MR. KOENIGSBERG: Mr. Chairman, the Tribunal's
4 rules limit us to the direct case that is presented, but
5 since counsel himself has raised this question, I think it
6 is fair for us to look at the answer to this.

7 MR. EISEN: I haven't raised the question except
8 in the context of its relevance.

9 CHAIRMAN RAY: The objection is overruled.

10 MR. EISEN: Very good. I have no further
11 objections at this time.

12 CHAIRMAN RAY: Okay, would you continue, please?

13 MR. KOENIGSBERG: Thank you, Mr. Chairman.

14 BY MR. KOENIGSBERG:

15 Q Ms. Messenger, let's return to your written
16 testimony, would you tell the Tribunal, in light of your
17 written testimony on pages one and two, what, in your view,
18 the strength of ASCAP, BMI and SESAC repertoires generally
19 is?

20 A Well, succinctly, those three performing right
21 organizations license virtually all of the copyrighted
22 music that is performed in the United States, and that is
23 music that is written by the domestic writers in the
24 United States and published here, and also, the foreign
25 repertoires that all the countries who have relations with

1 ASCAP, BMI and SESAC.

2 So that, in effect, we have 99 percent I would
3 say of all of the music licensed by these organizations,
4 we are talking about hundreds of thousands of licensees,
5 millions and millions of performances, thousands of members,
6 and when you put it all together and you really have the
7 dominant position in the American industry.

8 Q You said 99 percent, do you mean to limit your
9 testimony to 99 percent? In your written testimony you
10 say you do not mean only 99 percent?

11 A Not at all, I would say virtually all.

12 Q Why is that position so dominant, in your view?
13 And I refer here to the written testimony that is on the
14 bottom of page 2 and going over to the top of page 3 of
15 the direct case.

16 A Well, you are dealing with millions of performances
17 across the country each day, and you are dealing with three
18 organizations that offer the users around the United
19 States a blanket license, access to these repertoires and
20 these repertoires consist not just of Spanish music, but
21 they consist of all the gendres of music, and it is this
22 opportunity that is used by the users around the United
23 States. And as a result of this operation, you find that
24 there is an annual collection of revenues for these
25 organizations in excess of \$350 million.

1 And I think these facts, and the fact that it has
2 been my experience that songwriters and copyright owners
3 would be members, or affiliates of one of the three
4 organizations. It would be most extraordinary not to
5 belong to one of those organizations, because that is a
6 recognizable fact, the clearinghouse function is paramount
7 here, and you can't effectively license performances in
8 a territory as big as the United States and around the
9 world without being associated with one of those organi-
10 zations.

11 Q You refer to the clearinghouse function and
12 the utility of the license to licensees, how does the
13 license that a performing rights society grants become
14 useful? How does it become useful to the licensee, what
15 is the benefit there?

16 A Well, it is the whole nature of the transaction,
17 the licensee does not have to obtain permission from the
18 individual copyright owner, it doesn't have to get clearance
19 in advance; they have an absolute access to whatever is in
20 the repertoire of these organizations, and that includes
21 works that are created today, tomorrow and yesterday. It
22 is why the blanket license is used around the world.

23 And yet in the United States, if the individual
24 would like to license on his or her own, they are free to
25 do so in the ASCAP. And I believe that is true of BMI and

1 I assume the same would be true of SESAC.

2 Q Is there a benefit to users of getting a blanket
3 license from an organization such as ASCAP, BMI and SESAC?

4 A Absolutely, because they have the immediate
5 right to use anything and everything as often as they wish
6 for a flat fee, or a percentage of gross, depending upon
7 the form of license that is in place.

8 Q Let's turn, Ms. Messenger, to your written state-
9 ment, at the top of page 4, and let me ask you to share
10 your views with the Tribunal on the strength of the ASCAP,
11 BMI and SESAC repertoires in the area of Spanish-language
12 music?

13 A Well, in that respect, the ASCAP, BMI and SESAC
14 repertoires contain heavily performed Spanish-language
15 titles. And we have provided lists of those titles to
16 the Tribunal, and we have looked at those titles from the
17 point of view of our survey that we will be talking about
18 later.

19 We have also provided lists of the foreign
20 societies, the Spanish-speaking societies whom we represent,
21 and that is, in effect, the world Spanish repertoire. And
22 anyone who cares, again, to use that repertoire at any
23 spontaneous moment they choose to do so, has that
24 opportunity by virtue of an ASCAP, BMI or SESAC license.

25 Q Let's now turn to this limited survey, as it is

1 called, that was conducted on jukeboxes in Hispanic com-
2 munities.

3 Given the background of the Tribunal's recommenda-
4 tion and its order of July 30th, that a survey of jukeboxes
5 be made, would you tell the Tribunal what your concerns
6 were as to conducting such a survey?

7 A Well, the concern obviously is one of what kind
8 of valid statistical results we would get from such a
9 survey, and what cost. And in our past experience we have
10 found that our surveys are very expensive, and ~~did this~~
11 proceeding justify the kind of costs where we had looked
12 at a survey once before, and we thought it cost in excess
13 of \$200,000. And we are talking about less than that in
14 this whole proceeding.

15 So, it really raises a question of what we should
16 do, but being mindful of the Tribunal's wishes here, we
17 did conduct an informal limited survey.

18 Q Let me ask you this before we pass on to that
19 survey, that limited informal survey. You mentioned the
20 \$200,000 figure, and for the sake of the Tribunal's know-
21 ledge and the completeness of the record, do you recall
22 where that figure came from?

23 A Yes, it came from our survey experts and we
24 consulted them, and ask them, and that was their estimate.

25 Q Was that consultation made before, or after the

1 Tribunal's 1979 Jukebox Royalty Distribution decision in
2 which the Tribunal recommended such a survey?

3 A It was made after.

4 Q Let's turn to the limited and informal survey
5 that was conducted. Would you tell the Tribunal how it
6 was conducted?

7 A Yes, we asked our licensing representatives in
8 three geographic regions in the United States --

9 Q Excuse me, how many?

10 A I'm sorry, four. I forget about New York as home
11 territory.

12 Q Many other people do, too, I think.

13 A New York, one; Miami is two; San Antonio is
14 three, and Los Angeles, four. I don't put them in any
15 order, except by recollection. And we asked them to go
16 out and select any Hispanic community, in those territories
17 of 20 jukeboxes, and they were really left on their own
18 as to how to pick the 20.

19 And we sent out our representatives, they were
20 asked to find the -- list the name of the establishment,
21 its location, whether the jukebox there had a license, or
22 not, and who the jukebox operator was -- the nature of the
23 jukebox, was it the establishment owner or the jukebox
24 operator. And, of course, to list the titles of the works
25 on the jukebox.

1 Q Again, for the Tribunal's edification when the
2 representatives went out to take a look at these boxes,
3 do you know if they had any difficulties or not, as a
4 general matter?

5 A The difficulties of the licensing of performance
6 of music are extraordinary, it is a tough job, it is a
7 dangerous job. The men and women are often threatened
8 and sometimes physically abused by potential licensees.
9 It is a very difficult thing, in fact, in this case when
10 our people went out, we had some reports of the difficulties
11 they had.

12 And I would like to read, if I may, the efforts
13 to license or to collect data on the jukebox in a place in
14 San Antonio, called The Winds Belgium Diner --

15 MR. EISEN: I would object, Mr. Chairman. Again,
16 there is no possible way that such testimony could advance
17 this record pursuant to the remand order. There is no
18 issue that we have to confront that depends on the
19 difficulties that ASCAP had in making this limited survey
20 that Ms. Messenger has testified to.

21 CHAIRMAN RAY: Comments?

22 MR. KOENIGSBERG: Yes, Mr. Chairman. I should
23 think that you would want to know how this look was con-
24 ducted, how the representatives did take a look at these
25 jukeboxes, and whether, as a general matter, they couldn't

1 go into these places, or whether as a general matter they
2 could, and the specifics whether they had difficulties or
3 not. That goes to the weight that you will give this
4 testimony. And I think it is important that you know it,
5 and I think that Ms. Messenger does, too.

6 CHAIRMAN RAY: The objection is overruled.

7 MR. EISEN: Thank you.

8 BY MR. KOENIGSBERG:

9 Q All right, Ms. Messenger, let's turn then to
10 -- continue with your written testimony, at the bottom of
11 page 5 and on to page 6. You had mentioned that the
12 representatives had been asked to visit about 20 such
13 places with jukeboxes, ultimately how many jukeboxes were
14 looked at?

15 A We looked at 76 jukeboxes, and you will notice,
16 for example, that while I said we were asking our people
17 to look at 20 in each of these four geographical regions,
18 they had only got about 19 in Miami, and 17 in San Antonio.

19 For example, in San Antonio, where our people
20 were threatened, physically, when they went in and tried
21 to obtain a listing on the jukebox.

22 MR. KOENIGSBERG: Mr. Chairman, it has been
23 pointed out to me that the Second Circuit, in its remand
24 decision, urged us that a survey be made.

25 In light of the Tribunal's sustaining the objection

1 that counsel has made to this question of what difficulties
2 arose, I would like to make an offer of proof to the
3 Tribunal, so that the record will be complete on that.

4 CHAIRMAN RAY: I see nothing in her direct case
5 that describe the difficulties that she had. You had an
6 opportunity to conclude that.

7 MR. KOENIGSBERG: All right, Mr. Chairman.
8 Let's then proceed with the --

9 CHAIRMAN RAY: The Tribunal I think from the
10 testimony that was just given, can -- I think Ms. Messenger
11 has pointed out some of the difficulties and dangers
12 involved.

13 MR. KOENIGSBERG: Very good, Mr. Chairman. We
14 will move along.

15 BY MR. KOENIGSBERG:

16 Q Ms. Messenger, would you share with the Tribunal
17 some of your reservations about the nature of this limited
18 and informal survey?

19 A Well, the biggest reservation, of course, is that
20 it is not what my friends call big and Peter Boyle would
21 call a statistically valid representative random sample.
22 It is a limited, informal survey. And it raises questions,
23 as you can tell from my written testimony, as to the
24 importance of the jukeboxes and the use of Spanish-language
25 music, and whether the Hispanic community is representative

1 of the jukebox world. In general, it raises perhaps more
2 questions than we have been able to answer at this point.

3 Q The issue has been raised of the licensed or
4 unlicensed nature of these jukeboxes, just to repeat, how
5 many of these 76 jukeboxes had current certificates showing
6 that they were licensed?

7 A Five had current certificates, and I can tell
8 you that there was no Latin American music work found on
9 any of those five boxes.

10 Q Do you have any idea of what songs were actually
11 performed on these jukeboxes -- on these 76, I should say?

12 A Yes, I do. We analyzed the works that were
13 performed on those jukeboxes, and we came up with a total
14 of 11,592 --

15 Q Ms. Messenger, before you get to those numbers,
16 I don't think I was clear in my question. Let me put it
17 this way, do you know what works were performed on the
18 boxes, or do you know what works were listed on the boxes?

19 A I beg your pardon, I know what works were listed
20 on the boxes, there was no effort, which of course, is one
21 of the serious effects you would have from a question of
22 frequency of use -- no effort to sit and listen to per-
23 formances. You would have to develop a whole system of
24 staying X-number of hours and days, and you would have to
25 consult our economic consultants to find out what would be

1 a valid survey in that respect.

2 Q Given these limitations, let me ask you what the
3 analysis of the listings of the songs on these boxes showed?
4 You were about to tell us how many listings there were.

5 A Yes, on the 76 boxes, there were 11,952 works
6 listed.

7 Q I'm sorry, Ms. Messenger, 11,952?

8 A Yes, 11,592 works listed, and there were, we
9 found, 23 works of Latin American music, and they accounted
10 for 45 listings.

11 Q Latin American has made some representations to
12 the Tribunal, as I recall, about the nature of jukeboxes
13 in Hispanic communities, what percentage of the works on
14 these jukeboxes in Hispanic communities were in the
15 Spanish language, and what percentage were not?

16 MR. EISEN: I object, I don't believe that you
17 addressed this in your direct case.

18 MR. KOENIGSBERG: Mr. Chairman, I refer you to
19 the paragraph on the bottom of page 7 and the top of page
20 8.

21 CHAIRMAN RAY: Excuse me --

22 MR. EISEN: I am satisfied that the witness can
23 answer.

24 CHAIRMAN RAY: Commissioner?

25 COMMISSIONER AGUERO: Were there any works that

1 are not found in ASCAP, BMI, SESAC, Latin American music
2 in the catalogue, any music not represented by ASCAP, BMI
3 and SESAC?

4 THE WITNESS: There were some works that we were
5 not able to fully identify, so I can't respond.

6 COMMISSIONER AGUERO: Hispanic titles?

7 THE WITNESS: Spanish titles, yes; there were a
8 few English language titles, I believe.

9 COMMISSIONER AGUERO: Do you have a number?

10 THE WITNESS: I do not.

11 CHAIRMAN RAY: May I ask you why did you feel it
12 unnecessary to compute a percentage of the ones that you
13 found that were not licensed by any of the existing, or the
14 parties involved?

15 THE WITNESS: In my understanding, it was a very
16 minute portion. I can't give you the answer --

17 CHAIRMAN RAY: What would minute be?

18 THE WITNESS: Under 2 percent, it would be small.

19 CHAIRMAN RAY: Thank you.

20 MR. KOENIGSBERG: Mr. Chairman, to follow up on
21 your questions, and to put to rest one point. Remember in
22 my opening statement I stressed to you that we were going
23 to do two things, one was an affirmative showing of ASCAP,
24 BMI and SESAC entitlement. And the second was -- you might
25 think of it as a negative showing, as to the entitlement of

1 the Latin American group. This evidence is coming in to
2 you on the later point, not on the former point.

3 Now, let me ask the witness one question which
4 will make the record absolutely clear on that.

5 BY MR. KOENIGSBERG:

6 Q Ms. Messenger, was any analysis done of the works
7 on these jukeboxes to show whether they were ASCAP, BMI or
8 SESAC?

9 A No, there was not. It was not done, what we
10 were doing was taking the Latin American music list and
11 running it against the titles listed on them.

12 COMMISSIONER AGUERO: Two percent of 11,000 is
13 under 200 titles.

14 THE WITNESS: I would say less than that.

15 COMMISSIONER AGUERO: Two percent?

16 THE WITNESS: Less than that -- they may very well
17 be ASCAP, BMI, or SESAC works, for example, but we just
18 don't have -- we didn't spend a lot of time trying to
19 identify each one of these works. And I think that is a
20 critical question, how much money and effort can be put
21 into identifying that, by writing to the Spanish-speaking
22 foreign societies, for example, we would be able to
23 ascertain whether they could give us any information about
24 these works. That's something we do all of the time as
25 part of what a performing right organization does.

1 I think this testimony is very important and
2 obviously we have all sorts of techniques for identifying
3 and tracing down works, which were not employed.

4 COMMISSIONER AGUERO: Thank you very much.

5 BY MR. KOENIGSBERG:

6 Q Now, Ms. Messenger, again, what percentage of the
7 music on the jukeboxes in Hispanic communities was in the
8 Spanish language and what percentage was not?

9 A Roughly 58 percent were in the Spanish language
10 and some 41 percent in the English language.

11 Q Now, you testified, let's just repeat it, how
12 many of these 11,600 of the listings of the works that
13 were on the Latin American list?

14 A 45 listings of 23 works.

15 Q Now, do you think that that percentage, 45 over
16 11,600 approximately, is the share to which the Latin
17 American group would be entitled here, assuming of course
18 that they, in fact, do own the works that they claim --
19 we will make that assumption for the sake of argument --
20 do you think that that is the share to which they should
21 be entitled?

22 MR. EISEN: Objection. I don't see why this
23 witness should be qualified to answer that question. Part
24 of that question is going to be subsumed by the Tribunal,
25 you are going to have to make a decision on that.

1 Her conclusion as based on an answer to that
2 question is wholly irrelevant.

3 MR. KOENIGSBERG: Mr. Chairman, I refer you to
4 the second full paragraph of Ms. Messenger's testimony on
5 page 8, as to the further analysis that has been done,
6 based upon the survey.

7 MR. EISEN: And objecting to it whether or not
8 it is in the direct case, or not, it doesn't matter. It
9 is irrelevant.

10 CHAIRMAN RAY: The objection is overruled.

11 BY MR. KOENIGSBERG:

12 Q Ms. Messenger, do you recall the question, or
13 shall I ask it again?

14 A Would you please repeat it?

15 Q Sure. My question was is this percentage of
16 45 over 11,592 in your view, the share that the Tribunal
17 should award Latin American, or is some further analysis
18 that should be done?

19 A Well, I think you should look at my written
20 testimony on pages 8 and 9, if I may refer the Tribunal
21 to it, and you will see where we considered where the
22 Hispanic jukeboxes are located, and where the Hispanic
23 community resides, generally in the United States, and
24 look at the population figures. You see that 6.4 percent
25 of the population is Hispanic, and perhaps, that is one in

1 16. And if you take one in 20, and you project those
2 figures out, you would end up with an award from this
3 Tribunal for the Latin American music company, of \$564
4 for '82, and \$555 for '83. That's assuming that they
5 are to be considered performing right organizations, about
6 which I have great reservations.

7 Q Ms. Messenger, let me ask you to conclude your
8 testimony with your suggestions to the Tribunal, perhaps
9 you could tell the Tribunal what your reservations are?

10 A Well, --

11 MR. EISEN: I object to that question, as well,
12 Mr. Chairman and Commissioner Aguero, that is for you to
13 determine. This witness's beliefs are, again, irrelevant
14 to the question of whether or not ACEMLA is a performing
15 rights society.

16 MR. KOENIGSBERG: Mr. Chairman, if I may be heard.
17 We have qualified this witness as having had -- forgive
18 me, Gloria, 30 years experience in the performing rights
19 area. And the Tribunal has always solicited views of
20 witnesses who are knowledgeable in areas to assist you
21 in making your decisions. And that is the purpose for which
22 this testimony is offered.

23 MR. EISEN: But, Chairman Ray, that is an ultimate
24 conclusion, that the Tribunal is going to have to wrestle
25 with and decide whether or not ACEMLA presented in its

2 fect case enough evidence to show you that it is a
3 performing rights society. The conclusions of Ms. Messenger,
4 whether it is based on a great amount of time, or otherwise,
5 is something that I don't think is going to help you reach
6 that decision.

7 CHAIRMAN RAY: Well, the Tribunal has in the
8 past, and will continue to avail itself to expert informa-
9 tion. And as to whether the Tribunal gives any weight to
10 it, is just another process of trying to reach a final
11 determination.

12 So, because of that, the objection is overruled.

13 MR. EISEN: I would just like to state for the
14 record though -- I understand your position, I don't
15 disagree with it as deeply as you may think. However, if
16 we were talking with a purely objective witness and someone
17 who is qualified as an expert to determine objectively an
18 ultimate conclusion of fact, that's one thing.

19 This is a self-serving statement by a litigant
20 in this proceeding, and I just don't think that it is going
21 to help you make your decision.

22 CHAIRMAN RAY: I believe, sir, that the Tribunal
23 has had a lot of experience with self-serving statements.

24 (Laughter)

25 CHAIRMAN RAY: We will know how to handle it.

 MR. EISEN: Well, okay.

1 Tribunal for jukebox performances.

2 I think we have proved that in joint entitlement
3 to that money, and I would recommend that our agreed upon
4 settlement and the small sum allocated to Italian Book,
5 and if in your wisdom you feel obliged, to give a few
6 hundred dollars for Latin American music, I think that would
7 be a way for this Tribunal to go.

8 MR. KOENIGSBERG: Mr. Chairman, we have no
9 further direct. We open Ms. Messenger to questions from
10 the Tribunal and cross.

11 CHAIRMAN RAY: Commissioner?

12 EXAMINATION BY THE TRIBUNAL

13 BY COMMISSIONER AGUERO:

14 Q The Tribunal's request, for example, of the
15 most performed Spanish language songs in the catalogue,
16 the ASCAP, BMI, SESAC on the appendix page 1982 and 1983
17 are the ones most played in the jukeboxes in 1982 and 1983?

18 A No, that is based on our analysis of our normal
19 service. And I think that is really where the Tribunal
20 ought to lay its stress, frankly. I think it is interest-
21 ing to have the jukebox informal unscientific survey, but
22 I think what is very scientific, very formal and very
23 valid is the ASCAP, and I assume BMI and SESAC surveys.
24 And those numbers come out of our radio survey and our
25 survey of all other media, in the normal course of our

1 business.

2 So, those I would say are very sound bases for
3 a finding.

4 Q The Appendix A or Appendix B?

5 A I don't have exactly what A and B are.

6 MR. KOENIGSBERG: That is a filing of August 9th,
7 I believe, Commissioner, that's the exchange of the most
8 performed works that the parties put in on August 9th.

9 Was your question, sir, whether those works were
10 works that were performed on jukeboxes?

11 COMMISSIONER AGUERO: Yes, in 1982 and 1983. Or
12 is this just the most performed repertoire that you have
13 for 1982 and 1983?

14 THE WITNESS: Well, don't forget we are talking
15 about a jukebox survey that speaks in 1985, because you
16 couldn't go back and ascertain what was performed earlier.

17 These two lists that you refer to are actually
18 works that were performed in the ASCAP, BMI and SESAC --
19 ASCAP and BMI surveys for the years 1982 and 1983. So
20 that is what we know actually took place for those years,
21 and those two years that you are distributing money.

22 BY COMMISSIONER AGUERO:

23 Q These are the ones for '82 and '83 finally, the
24 most Spanish or Latin music performed on jukeboxes in 1982
25 and 1983?

1 A No, on radio, television, but some of those
2 works I am sure appeared in the jukebox survey. But, as I
3 said, we only looked at the Latin American music works,
4 to see which works were listed. There was no effort to
5 really go to any in-depth analysis of what the rest of the
6 works were on the jukeboxes.

7 COMMISSIONER AGUERO: Thank you very much.

8 MR. KOENIGSBERG: Commissioner, are you clear
9 then on where those lists came from?

10 COMMISSIONER AGUERO: Yes.

11 CHAIRMAN RAY: Anymore questions?

12 COMMISSIONER AGUERO: No. Thank you.

13 CHAIRMAN RAY: All right, we will take a 15-
14 minute recess and then we will come back with cross.

15 (Whereupon, a short recess was taken)

16 CHAIRMAN RAY: Back on the record.

17 Just before we start cross, do we have any
18 additional questions?

19 COMMISSIONER AGUERO: Yes.

20 BY COMMISSIONER AGUERO:

21 Q Ms. Messenger, I would like to find out through
22 you who represented in this country the repertoire of
23 Julio Iglesias; Oscar DeFontana; Roberto Carlos, from
24 Brazil, and Rafael from Spain; and Emmanuel from Mexico
25 whose works are so popular in this country, in Florida,

1 in Miami, in San Antonio, Texas; California; Chicago,
2 Illinois; New Hampshire; Connecticut -- all over the
3 country, who has the right of those songs?

4 A ASCAP, BMI or SESAC I assure you has the right.
5 We have filed with the Tribunal, I believe, the more
6 important members, affiliates of the three organizations,
7 and I don't know which exhibit it is, but there is an
8 exhibit, I know, because of my own involvement, I know
9 that Julio Iglesias is a member of ASCAP. And I recognize
10 some of the other names as well.

11 Q Roberto Carlos of Brazil?

12 A I believe he -- I am not sure whether he is ASCAP
13 or BMI. I know he is a performer.

14 Q And going back to Appendix A and B, these are
15 the most Hispanic music played on radio in the years of
16 '82 and '83?

17 A That's correct. Now, in the ASCAP survey, which
18 I am most familiar with, we tally the world's performances,
19 those that are performed in the United States, the world's
20 repertoire, and based on that repertoire, we pay out the
21 monies that ASCAP collect to our own members and to the
22 affiliated arts societies that we represent.

23 I know BMI does the same thing, and SESAC does
24 as well for their affiliates and opposite numbers abroad.
25 And that is the scientific random sample, that gives you

1 the universe of music in the United States, performance
2 of music in the United States.

3 Q Do you have a song in Spanish and it is sung in
4 English, do you consider that song as Spanish, or English?

5 A Well, we consider it -- I have to answer that
6 this way, as far as the ASCAP survey is concerned, and
7 ASCAP, we are blind as it were as to the origin of the
8 music, basically where it is performed -- it is all done
9 scientifically, and only at the very end when we allocate
10 the monies to the individuals -- the writers and the
11 publishers, then this becomes relevant as to whether it is
12 Spanish, or English, French, German -- it doesn't matter.

13 If it appears with an English title, we have
14 records that could get us back to the original Spanish
15 title. We do in most cases. And we would pay out the way
16 it should be paid. And if it is a Spanish writer with an
17 English-American co-writer, who did an English translation,
18 both of them would share in the appropriate fashion.

19 COMMISSIONER AGUERO: Thank you very much.

20 No more questions.

21 CHAIRMAN RAY: Before we move on, there are a
22 lot of songs in there like Green Eyes, I believe, these
23 things were back when I was in high school. Are they still
24 getting performed?

25 THE WITNESS: They certainly are, they are

1 standards, and they are performed, indeed. You know, ASCAP
2 is able --and perhaps I should correct something I said
3 before. I think I may have misled the Tribunal, I talked
4 about the unidentified works, when I speak of unidentified,
5 I am speaking of ASCAP's survey, and we tally all perform-
6 ances that we pick up in our survey. We don't just tally
7 ASCAP performances, we attempt to tally and allocate to
8 all copyright owners, and will pay them. But we tally
9 them on that basis, that is based on my years at ASCAP.

10 I know that based on the ASCAP survey, we have
11 roughly under 2 percent of the works unidentified.

12 BY CHAIRMAN RAY:

13 Q But the 1982 and 1983, it bothers me a little
14 bit, I can't imagine Spanish Harlem and Green Eyes --
15 what kind of music --

16 A Spanish Harlem is not the only place where you
17 get some well-known standards, anymore than Besame Mucho,
18 I assume is going to show up in --

19 Q But what I am saying, I am talking about a younger
20 group of music people, when the disco era came out, the
21 radio era was just beginning, are the young Hispanic kids
22 that go out to these joints, are they -- where is there a
23 list of the music that they are listening to?

24 A At ASCAP, BMI or SESAC, I can assure you, because
25 we have the young Hispanic writers, as well as the established

1 Spanish writers.

2 COMMISSIONER AGUERO: But not in this one here?

3 THE WITNESS: Those are works that are the most
4 performed works. That is not to say that there isn't a
5 work by a young kid that didn't appear in the ASCAP survey,
6 I am sure it did. And Paul Adler, who will be speaking
7 more about the ASCAP survey, I am sure, can fill you in
8 on that.

9 Don't forget, those are the most performed works
10 as I recall.

11 COMMISSIONER AGUERO: Also, I am very disappointed
12 there are so many misspelled Spanish titles, I want to
13 teach people to spell in Spanish.

14 MR. KOENIGSBERG: Commissioner Aguero, word
15 processors now have dictionaries built into them to correct
16 spelling errors, but unfortunately they are only English
17 dictionaries, not Spanish dictionaries.

18 CHAIRMAN RAY: Commissioner Aguero, did I say
19 it correctly?

20 COMMISSIONER AGUERO: Yes, go ahead.

21 CHAIRMAN RAY: Commissioner informed me that
22 three or four of these songs probably should be Italian
23 Book Store, because they are Italian songs, and another
24 two or three were French songs, is that correct?

25 COMMISSIONER AGUERO: Adieu Tristesse, Antonio

1 Carlos; El Amor Brujo; La Danza del Fuego (inaudible) --
2 these are French songs.

3 THE WITNESS: I must say, I don't know, but I
4 can certainly find out for you. I will be surprised,
5 because these were reviewed by our Spanish-language expert.

6 COMMISSIONER AGUERO: Also, La Danza del Fuego,
7 the Fire Dance, you have it twice, and Wish of Love --
8 is like a small operetta, and then they have one of the
9 songs La Danza del Fuego.

10 THE WITNESS: That's an appropriate listing, if
11 I understand what you are saying, you are talking about
12 what we call a serious work, a concert piece, which also
13 must have a shortened versions, and different parts of it,
14 perhaps, used independently, and would be appropriately
15 listed as two separate --

16 COMMISSIONER AGUERO: And you have 74 titles in
17 1982, and in 1983 the same titles.

18 THE WITNESS: Because, again, they are the most
19 performed, and it is a fact of a scientific random sample
20 where works that are most performed are most performed.

21 COMMISSIONER AGUERO: Alla en el Rancho Grande
22 by Bing Crosby and the Andrews Sisters -- thank you very
23 much, no more questions.

24 CHAIRMAN RAY: Mr. Eisen?

25 MR. EISEN: Yes.

CROSS-EXAMINATION

BY MR. EISEN:

Q Just a couple of questions. Let's refer to Appendix A for just a minute, where the Chairman and Commissioner Aguero were referring to a minute ago.

A I don't have a copy with me.

MR. KOENIGSBERG: May we have a moment, Mr. Chairman, to get a copy for the witness?

CHAIRMAN RAY: Yes.

MR. KOENIGSBERG: That is to the filing of August 9th, 1982.

MR. EISEN: That's right, Appendix A and B that I am interested in. I really only have a couple of questions with regard to those exhibits.

BY MR. EISEN:

Q First of all, do you know for a fact that La Fia (phonetic) music has been boiled down into something playable on jukebox?

A I don't.

Q You don't?

A This is not a jukebox list, this is a --

Q Yes, I understand that. In fact, you don't know whether or not any of these songs included in these appendices are even manufactured on 45 rpm records, do you?

A Of my own knowledge, I don't, but I could also

1 add that --

2 Q Well, I only want your own knowledge, Ms.
3 Messenger.

4 MR. KOENIGSBERG: Mr. Chairman, I would like to
5 have the witness answer the question as she sees fit,
6 please.

7 THE WITNESS: I can tell you that in the ASCAP
8 distribution, where we distribute over \$200 million, we
9 use our radio and television surveys as a basis for distri-
10 buting monies that are in the jukebox Copyright Royalty
11 Tribunal fund --

12 MR. KOENIGSBERG: Mr. Chairman, please, I must
13 ask that the witness be allowed to complete her answer to
14 the question.

15 MR. EISEN: I will certainly allow the witness
16 to complete her answer.

17 BY MR. EISEN:

18 Q Again, let me ask you the question, you have no
19 direct knowledge that any of these items, these songs
20 included on the appendices are manufactured on 45 rpm
21 recordings, is that right, no personal knowledge about it?

22 A No, I don't.

23 Q Nor do you know the age of these works that are
24 included on these appendices, is that right?

25 A Age, in what sense?

1 Q How old they are.

2 A Specific copyright dates of each work?

3 Q Yes.

4 A No, I do not.

5 Q And I take it from those answers that you have
6 no direct knowledge as to whether or not any of these works
7 actually appeared on jukeboxes in 45 rpm format during
8 1982 and 1983?

9 A I do not.

10 Q During the course of this consolidated proceeding,
11 have you been privy to any data that was gathered by BMI
12 and SESAC regarding copyright music that those two societies
13 licensed?

14 A What do you mean by data?

15 Q Do you have information from other performing
16 rights societies with regard to the number of works that
17 they actually authorized to license?

18 A I believe there is some evidence before this
19 Tribunal and in the world at-large, and the Supreme Court,
20 for example -- case came down with the size of the repertoire
21 of ASCAP and BMI.

22 Q But apart from questions of size, do you have
23 any knowledge, personal knowledge of the specific numbers
24 and identifications of songs in the BMI and SESAC repertoires?

25 A A few, perhaps.

1 Q Well, with that understanding, referring to the
2 top of page 2 of your exhibit, I would be interesting in
3 hearing how it is that you can conclude that virtually
4 every piece of copyrighted music performed in the United
5 States is licensed by one of our three organizations?

6 A That is absolutely the case, based on ASCAP
7 sample, for example, our scientific random sample tests
8 what is performed. And I can tell you that 99 percent, or
9 more of the world's repertoire is represented by one of
10 those organizations.

11 Q Okay, so your answer is that when you do those
12 studies, that you also consider those songs which are in
13 the repertoires of BMI and SESAC?

14 A Yes. Let me explain, ASCAP's world, we distri-
15 bute our money to our members and affiliated performing
16 societies based on a written statement of how money is
17 distributed, distribution rules, weighting rules, very
18 elaborate rules. We then, in ASCAP's world, tally all of
19 the performances in our survey and try to identify them
20 all, and we have a very good sense of what music is
21 performed in the United States.

22 Q Well, I heard you testify to the fact that ASCAP
23 does this and ASCAP does that, has a good sense of what is
24 performed, but again, the question is whether you have
25 direct information with regard to those songs that are

1 in the repertoires of other performing rights societies?

2 A Well, you must understand when you say direct,
3 I am the Managing Director of ASCAP, these functions are
4 performed under my general jurisdiction. I don't have
5 first-hand hands-on knowledge these day. In the office
6 they say they wished I would keep out of some of the detail,
7 I get involved in.

8 Q I understand. So, would it be fair to say that
9 your testimony at the top of page 2 is based on a conclusion
10 not supported by any factual information in your possession?

11 A No.

12 Q Well, then perhaps you can explain to me how you
13 know what BMI and what SESAC have in their repertoires?

14 A I can tell you what comes into the ASCAP survey,
15 that is I have knowledge of what comes in to the ASCAP
16 survey, and I think I explained that -- ASCAP doesn't just
17 pay attention to what it licenses, it, in fact, tries to
18 identify every piece of music that comes into its survey.
19 And in that sense, I have a knowledge, a knowledge in the
20 sense that I am the Managing Director of what is performed
21 in the United States.

22 And, also, there are charts and there are other
23 tallies that we do, in the course of our operations, as a
24 large organization having 750 employees, that gives me an
25 expertise, if you will, on the fact that I think virtually

1 every copyrighted piece of music is accounted for by the
2 repertoires of ASCAP, BMI and SESAC.

3 Q But, again, do you have specific knowledge of
4 what is in the repertoires of BMI and SESAC?

5 MR. KOENIGSBERG: Mr. Chairman, this question
6 has been asked and answered.

7 MR. EISEN: It has been asked, but not answered.

8 THE WITNESS: Let me explain another fact --

9 MR. KOENIGSBERG: Please, I am objecting to that
10 question.

11 CHAIRMAN RAY: The question has been asked, you
12 don't feel that you have gotten an answer yet?

13 MR. EISEN: I did not get an answer. I heard
14 the witness testify to those things that ASCAP does. I
15 have asked three times now for information with regard to
16 whether the witness has knowledge of what are in the BMI
17 and SESAC repertoires, and I have not gotten a response to
18 that.

19 CHAIRMAN RAY: Would you please answer the
20 question?

21 THE WITNESS: The answer is yes, in the sense that
22 I am the Managing Director of ASCAP, and I do have know-
23 ledge, because our survey tallies all of the works that
24 appear in the survey. And as to what is in the repertoire
25 even of ASCAP, for work that is created today by the youngest

1 member or the oldest member, is part of the ASCAP repertoire,
2 I don't know of my own knowledge what's created today, but
3 it is part of the repertoire that is the beauty of a
4 blanket license.

5 BY MR. EISEN:

6 Q Well, just one final question, when you refer
7 to all works in the survey, do those works include works
8 that are in the BMI and SESAC repertoires?

9 A Yes.

10 Q Fine, thank you. I now have an answer to my
11 question.

12 CHAIRMAN RAY: I believe that she answered
13 previously.

14 MR. EISEN: No, I don't think she did, but the
15 record will reflect what she said.

16 BY MR. EISEN:

17 Q I am also interested in your statement at the
18 top of page 3.

19 A (Perusing documents)

20 Q It appears that you determined that no one would
21 want to join an organization, other than ASCAP, BMI or
22 SESAC, is that correct?

23 A I have determined that it wouldn't make good
24 economic sense to do so, in my view, yes.

25 Q That is based on your own conclusion, isn't it?

1 A I think it is based on the realities of the
2 music licensing market in the United States.

3 Q But it is your logic that applies to this parti-
4 cular statement, is that correct?

5 A It is my logic and the ASCAP survey, and all of
6 the other knowledge that I have been able to gather.

7 Q And you are ASCAP's chief operating officer, is
8 that right?

9 A Yes.

10 Q Have you done surveys of copyright owners them-
11 selves to see whether or not they support that statement?

12 A Surveys of copyright owners -- those copyright
13 owners belong to ASCAP, SESAC or BMI. I have never met a
14 copyright owner who didn't want to belong to one of those.

15 Q Does it seem unreasonable to you that Hispanic
16 composers, for instance, would rather have an Hispanic
17 company, corporation act on its behalf as a society?

18 A What was your word that you used -- do I think
19 it --

20 Q A holder of an Hispanic music copyright?

21 A Yes, but you said --

22 Q Does it seem unreasonable that someone in that
23 position would rather have an Hispanic company licensing
24 its works?

25 A As I tried to explain, ASCAP doesn't license

1 English language, it doesn't license show tunes, or country
2 tunes, it licenses the world repertoire. ASCAP's members
3 and foreign societies. So, too, does BMI and SESAC. And
4 I would think it would be more logical, more rational for
5 them -- for a Hispanic writer and publisher to want to be
6 affiliated with one of those organizations.

7 However, there are some people who may feel
8 strongly that they want to be with a Spanish publisher, or
9 they don't like X or Y.

10 Q Thank you. Can you describe ASCAP's distribution
11 system, insofar as monies trickling down to a composer?

12 MR. KOENIGSBERG: Objection, Mr. Chairman, I
13 would like to know what the reference in Ms. Messenger's
14 direct testimony to this is.

15 MR. EISEN: Well, Ms. Messenger has testified
16 that she can't imagine why anyone would rather go to a
17 performing rights society, other than ASCAP. I would like
18 to hear how her distribution system works with regard to
19 composers.

20 MR. KOENIGSBERG: Mr. Chairman, the question of
21 how the distribution system works was not part of her
22 testimony.

23 MR. EISEN: But there are distribution documents
24 that had to be submitted in the course of this proceeding,
25 and I think the witness can testify to that, Mr. Chairman.

1 CHAIRMAN RAY: Mr. Eisen, I believe it would be
2 very interesting to a lot of people here if she would
3 explain that, but it might take her the two days that we
4 have allotted for the distribution. I understand what
5 our objection is.

6 MR. EISEN: My point is, Mr. Chairman, that if
7 the distribution system that ASCAP uses is not in some way
8 as favorable as the distribution system that my client
9 uses, I think that directly relates to Ms. Messenger's
10 conclusion that it would be illogical for any composer or
11 copyright owner to utilize her company.

12 CHAIRMAN RAY: But, sir, I don't know what weight
13 even her statement has on the final determination of CRT.

14 MR. EISEN: I agree completely but you see fit
15 to allow it to continue into the record, and I think that
16 under the circumstances --

17 CHAIRMAN RAY: It is in the record.

18 MR. EISEN: Yes.

19 CHAIRMAN RAY: Of course it is in the record, and
20 we allowed it to continue, but we said in the beginning
21 that we would determine what weight we would give that.

22 MR. EISEN: Well, the problem is, Mr. Chairman,
23 I don't know what is in your and Commissioner Aguero's
24 mind, in terms of what weight it is given, and if these
25 are allowed to go into the record untested, it makes me,

1 and it puts my client at what I think is a significant
2 disadvantage.

3 I presume by your statement that there is not
4 going to be great weight accorded to this witness's con-
5 clusion, and under that assumption I will go further along.

6 CHAIRMAN RAY: To this particular statement.

7 MR. EISEN: That's right.

8 CHAIRMAN RAY: I see no purpose in proceeding on
9 the manner in which the payments are made.

10 MR. EISEN: It does, but do you see the dis-
11 advantage that I am at, you have allowed much of this
12 information to stay in the record, some of which was
13 allowed to stay in over objections that I made.

14 I think I can reasonably see, or I can argue
15 in findings of fact and conclusions of law just how much
16 weight is to be accorded to any of this witness's con-
17 clusary statements. But without knowing how you are going
18 to respond to those findings of fact and conclusions of
19 law, if there is something in here, I think it is relevant
20 to test.

21 CHAIRMAN RAY: On this particular issue the
22 objection is sustained.

23 MR. EISEN: Very good.

24 BY MR. EISEN:

25 Q Are there certain societies, Ms. Messenger, that

1 exist in Mexico and Puerto Rico, that you are aware of?

2 A Yes.

3 Q Do you have agreements with those societies?

4 A We have an agreement with the Mexican society.

5 Q What about the Puerto Rican society?

6 A To what do you refer to as the Puerto Rican
7 society?

8 Q A society in Puerto Rico that holds certain copy-
9 rights, and it may or may not agree with ASCAP, BMI or
10 SESAC or my client, to administer those copyrights as
11 performing works?

12 A I am not aware of any society in Puerto Rico that
13 is not affiliated with ASCAP, BMI or SESAC.

14 Q Have you been advised by the Mexican society that
15 they no longer wish to use the services of ASCAP?

16 A No, quite the contrary.

17 CHAIRMAN RAY: Excuse me, Ms. Messenger, is that
18 true for Spain?

19 THE WITNESS: ASCAP has an agreement with the
20 Spanish society, and so do BMI and SESAC.

21 COMMISSIONER AGUERO: Argentino, too?

22 THE WITNESS: Yes.

23 COMMISSIONER AGUERO: Venezuela?

24 THE WITNESS: I think we put in an exhibit of all
25 of the Spanish-speaking societies with whom we do have an

1 agreement to represent them in the United States, and they
2 represent ASCAP in their country.

3 BY MR. EISEN:

4 Q Let me direct your attention to page 5 of your
5 exhibit.

6 A (Perusing documents)

7 Q How many licensing offices are there that ASCAP
8 has?

9 A Twenty-two.

10 Q And those are located throughout the United
11 States?

12 A Yes.

13 Q Can you tell me how the limited survey that you
14 discuss at page 5 originated?

15 A It originated with a discussion with counsel,
16 as to how to comply with the Tribunal's suggestion that a
17 survey of jukeboxes we attempted.

18 Q And when did that discussion take place?

19 A I can't give you a specific date.

20 Q Within the last 60 days?

21 A Yes, I would say within the last 60 days.

22 Q Can you tell me in the aggregate how many persons
23 were involved in this survey?

24 A Who did the survey?

25 Q Yes.

1 A I think we are talking about somewhere between
2 four offices and in some offices I think we had three --
3 no more than 10 I think would be correct.

4 Q That is no more than 10 who actually surveyed
5 the jukeboxes that you refer to in your exhibit?

6 A That's right.

7 Q Were these all ASCAP employees?

8 A Yes, they were.

9 Q And they came from the various field offices, the
10 various licensing offices?

11 A Yes, they did.

12 Q Do you know over what period of time this survey
13 took place?

14 A I can't give you a specific date, but I think it
15 was within a week, but it would be subject to correction
16 by counsel.

17 Q Okay, you don't have any personal knowledge as
18 to how long it took?

19 A No, I don't.

20 Q Were there any underlining documents to support
21 these survey results that you mention in your exhibit?

22 A Yes, we have the lists of titles, I think they
23 were offered to you, or you could have had access to them.

24 Q What is the basis for your statement that I
25 could have had access to them?

1 A Well, they were put in here in my testimony, for
2 one thing. The reference to the fact that this study was
3 done.

4 Q But I am referring to the underlining documents
5 that resulted in the conclusions that you have made in your
6 exhibit?

7 A They do exist.

8 Q Is there any reason why the documents weren't
9 submitted in this consolidated proceeding?

10 A The results of the survey was what I was testify-
11 ing to.

12 Q Yes.

13 MR. KOENIGSBERG: Mr. Chairman, I would note for
14 the record that based on past practices of the Tribunal,
15 these documents of course exist and were available to
16 counsel, had he asked for them. He didn't ask for them.

17 MR. EISEN: Is there a procedure --

18 CHAIRMAN RAY: May I point out that in past
19 proceedings counsel -- any counsel can request the under-
20 lining documentation. If you have difficulty in getting
21 the documentation from a party then you come to the CRT.

22 MR. EISEN: I see. Just for my own reference, is
23 there a rule number that relates to this, or a past case
24 in which this serves as precedent for the production of
25 documents?

1 CHAIRMAN RAY: The past proceedings themselves,
2 there is no specific -- we can provide you with previous
3 proceedings, but there is no codification, there is no
4 regulation for it.

5 MR. KOENIGSBERG: Mr. Chairman, excuse me, to
6 clarify --

7 CHAIRMAN RAY: Except for the Cable Distribution.

8 MR. EISEN: I know there have been requests made
9 in this proceeding to adopt those Cable Royalty -- or those
10 procedures, which apparently have not yet been ruled on by
11 the Tribunal.

12 With regard to that, Mr. Chairman, I would like
13 to request that those --even at this late date, that those
14 underlining documents be produced by counsel.

15 CHAIRMAN RAY: Fine. Is there any difficulty in
16 providing counsel with the underlining documentation?

17 MR. KOENIGSBERG: Mr. Chairman, those documents
18 are available, but I would like to know for what purpose
19 they are going to be used.

20 MR. EISEN: Well, the witness has testified as
21 to a survey which clearly she believes is relevant in
22 deciding some of the issues in this proceeding. I think
23 we have a right to test the reliability of this survey by
24 looking at those underlining documents.

25 CHAIRMAN RAY: Will you provide the underlining

1 documents?

2 MR. KOENIGSBERG: Mr. Chairman, we will provide
3 the underlining documents, but I want to reserve on the
4 question of any submissions by ACEMLA, based upon those
5 documents at this stage of the proceeding.

6 MR. EISEN: We aren't doing anything at this
7 stage of the proceeding, except asking counsel to provide
8 us with documents.

9 MR. KOENIGSBERG: I said I will provide them, and
10 reserve on the issue, sir.

11 CHAIRMAN RAY: Would you also provide a copy
12 for the Tribunal?

13 MR. KOENIGSBERG: We will get the Xerox machines
14 humming, sir, yes, sir.

15 CHAIRMAN RAY: Thank you.

16 BY MR. EISEN:

17 Q The various field representatives that accomplished
18 this survey, they went to four specific cities, is that
19 correct?

20 A That's correct.

21 Q They went to Hispanic neighborhoods?

22 A That was their assignment.

23 Q Do you know how these various field representatives
24 determined what was an Hispanic neighborhood?

25 A Based on their own knowledge, other than that, I

1 don't know.

2 Q Were these field representatives assigned to each
3 of these cities, I mean, do they ordinarily work in these
4 cities to which they went?

5 A This is their normal territory, yes. Many are
6 with the general establishments in their territory, that's
7 their job. So that I felt confident that they would know
8 Hispanic territory in the city in which they are working
9 full-time.

10 Q And when you discussed the procedures to utilize
11 you made it clear to them that they should travel only to
12 Hispanic communities within these various cities?

13 A This was done under my supervision, but I did not
14 deal directly with the field representatives.

15 Q So you don't have any personal knowledge as to
16 whether or not these establishments that were visited were
17 in fact, located within the Hispanic communities?

18 A Only the representation made by the field staff.

19 Q Do you know whether or not there was any standard
20 that was used to determine what establishments to contact
21 in these various communities?

22 A I believe they were left free within the Hispanic
23 community to go into 20 establishments.

24 Q Well, who actually supervised the survey, did you
25 do that?

1 A What do you mean by supervise?

2 Q Was all information and all discussions with the
3 field representatives somehow channeled directly to you?

4 A The end results were.

5 Q But the activities that got to the end results
6 with regard to, for instance, what establishments they
7 would go to, and what was a Hispanic community, did you
8 have any input into that at all? Did they report to you?

9 A No, they did not.

10 Q Who did they report to?

11 A They report to the head of the general licensing,
12 and to counsel.

13 Q And who is the head of General Licensing?

14 A L. Barry Knittel, K-n-i-t-t-e-l.

15 Q And where is his office located?

16 A In New York City.

17 Q You didn't personally visit any of the communities
18 that were a part of this survey?

19 A No, I did not.

20 Q Do the underlining documents to which you referred
21 previously list the establishments that these field
22 representatives visited?

23 A Yes.

24 Q And do those underlining documents also list the
25 representatives themselves?

1 A Yes, they do.

2 Q And then it is your testimony that these repre-
3 sentatives listed the songs that they found on these juke-
4 boxes in those five Hispanic communities -- four Hispanic
5 communities, excuse me, together with the information on
6 the specific establishment, sent this information to New
7 York?

8 A That's correct.

9 Q And did Mr. Knittel process this information?

10 A Mr. Knittel was the conduit for counsel who guided
11 this survey.

12 Q There was no independent force within this survey,
13 everything that was done was done either by a representa-
14 tive of ASCAP, or its counsel?

15 A An ASCAP employee -- don't forget, we are talking
16 of a very limited, informal survey.

17 Q Yes, you made that clear in your direct examin-
18 ation. You mentioned also in your direct testimony some
19 of the significant limitations that you had ascertained
20 existed with regard to this informal survey. And I would
21 like to make sure I have it straight in my mind, you
22 included the fact that many of the jukeboxes found were
23 unlicensed.

24 How is that a limitation on the results of the
25 survey?

1 A It is a limitation in the sense that I understand
2 what this Tribunal is dealing with, and what we are here
3 for today, is to determine who is to collect monies that
4 are paid by licensed jukeboxes, without having obtained
5 a license, there would be no money.

6 Q So this universe that was used during this
7 survey really comes down to about 15 percent of the juke-
8 boxes having been licensed, is that correct?

9 A Yes, I think that is correct.

10 Q And the survey itself, of course, refers to songs
11 that were on these jukeboxes in the four Hispanic com-
12 munities --

13 A I'm sorry, you said 15 percent?

14 Q Yes.

15 A Of the 76 boxes, we looked at only 5 or 6.6
16 percent had current certificates. That's my testimony on
17 page 6 of the written testimony.

18 Q So your testimony is that there were less than
19 7 percent that were, in fact, licensed?

20 A That's correct.

21 Q And the survey that you took in 1985, admittedly
22 did not include any songs on these jukeboxes that you know
23 for certain were on those jukeboxes in 1982 and 1983?

24 A That is one of the severe limitations of the
25 survey.

1 Q You also testified that of the approximately
2 11,600 listings, copied from the jukeboxes, that only 45
3 were songs from ACELMA's catalogue?

4 A 45 listed, I think it was 23 individual songs.

5 Q Some were duplicated. This was based on ACELMA's
6 August 7th filing?

7 A The list of 179 works.

8 Q Do you know which titles they were?

9 A I just know that the list exists.

10 Q But you don't know which specific titles --

11 A Well, if you show me the list, I can't recite
12 179 -- they were given to our department.

13 Q Is this also included in the underlining documents
14 from the survey?

15 A The analysis that was made?

16 Q Yes, including your list of those ACEMLA titles
17 that appeared on the jukeboxes?

18 A Well, I am sure that we have among the papers
19 the analysis that was made of the jukebox titles. I can't
20 speak for counsel.

21 Q Have you ever seen the analysis?

22 A Yes, I looked at an analysis.

23 Q And you recall seeing what ACEMLA titles were
24 listed as a result of the analysis?

25 A Yes.

1 Q But you don't know which of those titles those
2 gathered by the field representatives belonged to the
3 ASCAP, BMI or SESAC repertoires, is that correct?

4 A That's correct, we were looking at the question
5 of Latin American music's entitlement, based on this
6 limited survey.

7 Q And is it your testimony that the reason you
8 didn't break these out into works administered by other
9 performing rights societies is that it simply wasn't
10 expedient or there wasn't enough time?

11 MR. KOENIGSBERG: Objection, Mr. Chairman, there
12 is an agreement between ASCAP, BMI and SESAC that we shall
13 file a joint claim, that agreement -- of course the text
14 of that agreement is confidential. Counsel is getting into
15 areas where the Tribunal has always not allowed questions
16 because of the confidential nature of voluntary agreements.

17 MR. EISEN: Mr. Chairman, that question has
18 nothing to do whatsoever with the agreement that any
19 performing rights society may have reached in this pro-
20 ceeding. It only has to do with the reason why ASCAP did
21 not list works that were within the repertoires of ASCAP,
22 BMI and SESAC, and yet it did so for ACEMLA. It has nothing
23 to do with an agreement that was reached.

24 MR. KOENIGSBERG: Mr. Chairman, I think the
25 question goes to one of all sorts of sensitive and

1 confidential issues, as to division of royalties among
2 ASCAP, BMI and SESAC, based on our voluntary agreements,
3 as to the nature of the cases we shall present, and the
4 question of an analysis of this survey in terms of ASCAP,
5 BMI and SESAC works, therefore, is directly relevant to
6 the question of the confidential agreement.

7 CHAIRMAN RAY: I believe that's the answer.
8 Did you list the titles by ASCAP, SESAC and BMI? I don't
9 see how that would necessarily impact upon any confidential
10 agreement. But if it goes further and asks as to the
11 breakdown between them, then perhaps I could see -- on
12 that basis, I think she should answer the question.

13 MR. KOENIGSBERG: Yes, sir, and on that basis
14 I will withdraw the objection.

15 MR. EISEN: I don't recall that the witness
16 answered the question.

17 THE WITNESS: If you could tell me the question --

18 CHAIRMAN RAY: Rephrase the question.

19 BY MR. EISEN:

20 Q Okay. Is it your testimony that you did not
21 break down those songs that were found on the jukeboxes in
22 those four communities for any purposes, other than those
23 works that are in the ACEMLA catalogue?

24 A Works that are in the Latin American music
25 category, yes.

1 Q The next question is why you did not do so?

2 A The effort here was to analyze the entitlement
3 of Latin American music, in ASCAP's view the proper way
4 -- in fact, the economic sensible way to distribute monies
5 that it gets from the Copyright Royalty Tribunal for
6 jukeboxes is based on its radio and television survey, it
7 doesn't distribute monies to its own members based on an
8 analysis of the jukebox world, because it is not economical-
9 ly feasible to do it.

10 Therefore, frankly, it wouldn't make good economic
11 sense to start fooling around with the very limited
12 informal survey.

13 Q So, having not broken down these songs into those
14 in the repertoires of other performing rights societies,
15 you can't say with any certainty whether or not any of the
16 songs on these jukeboxes were also in the catalogues of
17 ASCAP, BMI and SESAC?

18 A The answer is that I am certain I can identify
19 some works of my own knowledge, but the answer is for our
20 purposes the only important question we were looking at
21 is what would Latin American music's share of this informal
22 survey be.

23 Q I didn't get a responsive answer to that question,
24 Mr. Chairman.

25 MR. EISEN: Again, the question simply was isn't

1 it true that the witness is not able to testify that any
2 of the works on these jukeboxes, other than those which the
3 witness testifies were in the ACEMLA catalogue, isn't it
4 true that you cannot testify that the other works, in fact,
5 belong to some other performing rights society?

6 I did not get a responsive answer to that.

7 MR. KOENIGSBERG: Mr. Chairman, I believe he did.
8 Secondly, as I indicated in my opening statement, and as
9 Ms. Messenger has indicated, I will be happy to stipulate
10 with counsel that this limited survey is being offered not
11 as affirmative proof of ASCAP, BMI and SESAC's entitlement.
12 But solely to the question of ACEMLA's entitlement.

13 MR. EISEN: But for better or worse, it is in
14 the witness's direct case. Until the opening statement was
15 made there was no indication as to what the proffer would
16 be for anyway. And I think it is fair grounds, since it
17 is in the direct case, to ask that question and have it
18 answered.

19 CHAIRMAN RAY: We will allow the question to be
20 asked one more time, and please answer it to the best of
21 your ability, Ms. Messenger.

22 BY MR. EISEN:

23 Q Isn't it true that you are unable to testify which
24 songs found in this survey are actually in the ASCAP, BMI,
25 SESAC repertoire?

1 A I must tell you, as you perhaps recall, there
2 are 11,592 titles in the survey, 45 -- or listings, 45 of
3 which are Latin American music. I do not know of the
4 remainder, after deducting 45 from 11,592, the breakdown
5 between ASCAP, BMI and SESSAC.

6 Q Thank you.

7 MR. EISEN: Mr. Chairman, that's all I have for
8 the witness. Thank you.

9 MR. KOENIGSBERG: Mr. Chairman, do you want the
10 redirect now, or after lunch?

11 CHAIRMAN RAY: Well, let's see, it is 12:00
12 o'clock.

13 MR. KOENIGSBERG: The redirect will be very brief,
14 sir.

15 CHAIRMAN RAY: Okay, finish the redirect.

16 REDIRECT EXAMINATION

17 BY MR. KOENIGSBERG:

18 Q Ms. Messenger, just to clarify a point that
19 resulted from a question of Commissioner Aguero. In this
20 limited survey, of 76 jukeboxes, did you take any look in
21 this survey for unidentified works?

22 A No, we did not.

23 Q When you refer to a 2 percent number as being
24 unidentified, 2 percent of what is unidentified?

25 A ASCAP's normal regular survey it does in its

1 normal distribution process, the number I think of is we
2 have as unidentified, under 2 percent, and I used the 2
3 percent number.

4 Q What happens to that 2 percent that is unidentified,
5 is it ever identified?

6 A Oh, frequently it is, and I point out that we
7 don't allocate money to the unidentified, it doesn't sit
8 there, not paid out. We pay out all of the money for all
9 that we identify. We keep very minute records, called
10 solfeggio records, musical notes of works that appear in
11 our survey, in radio -- in surveys that we monitor. We
12 keep track of those feature performances and if we are
13 ever able to identify them, we pay to the writers, or
14 publisher members of ASCAP, or an affiliated society
15 for those performances.

16 Q Commissioner Aguero asked you some questions
17 about Appendices A and B, for the filing of August 9th,
18 the list of most performed works. Are those the works
19 that are most performed solely in the radio media, or are
20 they most performed in other media, as well?

21 A Were these not works performed in the ASCAP survey?
22 As I recall they included all of the media in the ASCAP
23 survey.

24 Q Chairman Ray asked you some questions about places
25 that one might find a jukebox. To your knowledge, are

1 jukeboxes found only in the joints patronized by young
2 people?

3 A No, even by types like me.

4 Q What would you, therefore, conclude about the
5 works that you might find on jukeboxes, generally, would
6 they include only works that are popular among the young?

7 A No, I think they would include a broad category
8 of works of every description, whatever is popular, whatever
9 the public likes to play, that's what we are involved in.

10 Q In response to a question from Mr. Eisen, do you
11 believe that the age of the works on these Appendices A
12 and B, in terms of their initial copyright dates is
13 relevant to the question before the Tribunal?

14 MR. EISEN: Objection, there is no basis for this
15 witness to answer that question. It is up to the trier
16 of facts to decide.

17 MR. KOENIGSBERG: Mr. Chairman, I will let you
18 decide.

19 MR. EISEN: Mr. Chairman, it is one thing to
20 qualify an expert witness to give a conclusion; it is
21 quite another thing to ask a party-litigant to answer a
22 conclusion --

23 CHAIRMAN RAY: The objection is sustained.

24 MR. EISEN: Thank you.

25 BY MR. KOENIGSBERG:

1 Q One last question, Ms. Messenger, going back to
2 the point about -- in response to Commissioner Aguero's
3 questions. When that less than 2 percent of unidentified
4 works are later identified, are those works found to be
5 in the repertories of ASCAP, BMI and SESAC, generally?

6 A Yes, they are.

7 MR. KOENIGSBERG: Thank you, Mr. Chairman, I
8 have nothing further.

9 CHAIRMAN RAY: Thank you, Ms. Messenger, thank
10 you for your appearance before us.

11 (Whereupon, the witness was excused)

12 MR. DUNCAN: Excuse me, Mr. Chairman, before you
13 declare a recess, could I point out that Mr. Anton is our
14 next witness. He did have travel plans to return to
15 California. His testimony is very brief. If it would be
16 possible to hear him before we adjourn, subject to cross-
17 examination, I would make that request.

18 COMMISSIONER AGUERO: I would like to recess for
19 an hour.

20 CHAIRMAN RAY: How will that affect you?

21 MR. EISEN: Well, first of all, is this part of
22 the joint submission, or are we dealing with something out-
23 of order?

24 CHAIRMAN RAY: I don't know what you mean "out of
25 order".

1 MR. EISEN: Is this part of the joint direct
2 exchange that ASCAP and SESAC have submitted?

3 CHAIRMAN RAY: Yes, this is the witness for
4 exhibit number, what?

5 MR. EISEN: This is a BMI exhibit, not ASCAP.
6 It is not part of the joint exhibit. I have no problem
7 with accommodating the witness at anytime. I have not
8 been asked whether or not there will be a problem if the
9 witness was taken out of order. I don't have any major
10 problem with it, especially since counsel has said that
11 it will be brief.

12 MR. DUNCAN: Your Honor, he is not being taken
13 out of order. I thought it was announced earlier that we
14 had four witnesses in our joint claim, and that they --

15 MR. EISEN: Well, I understood that this was
16 part of BMI's submission, am I wrong?

17 MR. DUNCAN: It is a joint submission, Mr.
18 Chairman, I don't know how to get that through to Mr. Eisen.

19 MR. EISEN: It's a joint submission on the part
20 of ASCAP and SESAC, there is a direct case that has been
21 exchanged on behalf of ASCAP and SESAC, there has also been
22 a direct case that has been submitted on behalf of BMI.

23 MR. DUNCAN: If I could invite counsel's attention
24 it says Direct Case, ASCAP, BMI and SESAC. And the first
25 paragraph says that the American Society of Authors,

1 Publishers and Composers; ASCAP, BMI and SESAC, have filed
2 joint claims. BMI hereby submits it portion of the direct
3 case in accordance with the Tribunal's order of July 30th.

4 MR. EISEN: Again, I am not going to raise an
5 objection, if it is for the purpose of the witness's
6 accommodation anyway.

7 CHAIRMAN RAY: Well, I was mainly concerned about
8 whatever your schedule was, but if we spend anymore time
9 speaking about this, of course, it will be 1:30. So, let's
10 call Mr. Anton.

11 Whereupon,

12 RON ANTON

13 was called as a witness, and having been duly sworn, was
14 examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. DUNCAN:

17 Q Mr. Anton, for the record would you state your
18 name, please?

19 A My name is Ron Anton.

20 Q And where are you from, sir?

21 A I am presently from Los Angeles, California.

22 Q And do you have before you a document which is
23 headed Testimony of Ron Anton?

24 A I do.

25 Q Which is included in the submission entitled

1 Direct Case of ASCAP, BMI and SESAC, is that correct, sir?

2 A That's right.

3 Q Would you state for the Tribunal and the record
4 your background and qualifications, Mr. Anton?

5 A Since 1977, I have served as Vice President of
6 California Broadcast Music, Inc. I have been with BMI for
7 more than 20 years, joining BMI's legal staff in New York
8 in 1964, later becoming Executive Director of Performing
9 Rights.

10 I moved to Los Angeles in 1971, where I oversaw
11 Performing Rights on the West Coast.

12 Before joining BMI I was employed as an attorney
13 with MCA, William Morris Agency, and Columbia Records.
14 And I am a past president of the California Copyright
15 Conference, and an active member of several other music
16 organizations.

17 Q And would you summarize your testimony, what is
18 the purpose of your testimony today?

19 A The purpose of my testimony is to comment briefly
20 on the history of BMI's representation of writers and
21 publishers of Latin music, and the importance of this music
22 in the BMI repertoire.

23 Q And you heard Ms. Messenger's earlier testimony
24 this morning?

25 A Yes, I did.

1 Q Tell us about the BMI Latin repertoire.

2 A As an exhibit to my testimony is the 1976 BMI
3 publication entitled The Many Worlds of Music, this volume
4 traces the history of Latin music in this country during
5 the past 120 years, and identifies some of the major Latin
6 writers and publishers and their musical compositions, and
7 contributions.

8 While the emphasis on the writers and publishers
9 is discussed in this publication is on BMI affiliates,
10 reference is made to certain ASCAP members as well.

11 In addition, there is a glossary of Latin musical
12 terms, forms and instruments. And, finally, brief
13 biographic profiles of 21 major Latin music figures repre-
14 sented by the Music Claimants who have been very important
15 in the development of American popular music.

16 As you can see from a review of this volume, from
17 as early as the mid-1800s Latin music has made a sub-
18 stantial impact on American popular music and dance. From
19 the early popularity of Mexican music in the American
20 border states, through the music of the tango, the mambo,
21 the cha-cha-cha, bossa nova, and so on, the contribution
22 of Latin music has become fully incorporated in the
23 American musical experience.

24 Representation of virtually all of the major
25 Latin music writers and publishers by the Music Claimants.

1 has continued unabated through the years here under review,
2 1982 and 1983, to the present. By its submission of
3 August 9, 1985, BMI and ASCAP have identified a representa-
4 tive sample of the most performed Spanish-language songs
5 in their respected repertoires for those years, the years
6 of 1982 and '83.

7 A review of this listing and the list provided
8 by the so-called Latin Claimants, indicates that the major
9 performing rights societies represent virtually all of
10 the important Latin musical works, as well as the Latin
11 standards which continue to log substantial performances.

12 In this regard I note that BMI data indicates
13 that as of June 1968, 12 BMI Latin songs were designated
14 as having more than one million performances; an average
15 performance is approximately three minutes in length.

16 Furthermore, current information reveals that
17 three Latin songs have achieved the two million performance
18 mark, Brazil, The Breeze and I, and Yours -- Quiereme
19 Mucho, and that the Girl from Ipamema has reached the
20 extraordinary three million performances mark.

21 Q And what is your conclusion, sir?

22 A Well, first let me say that I appreciate this
23 opportunity to appear before the Tribunal today, to
24 describe in brief the scope of our Latin repertoire. Our
25 commitment to the representation of the Latin music

1 community which can be traced for 40 years, continues today.
2 And the diversity of the repertoires of the Music
3 Claimants has led to the success of these organizations.

4 And the contribution of gifted Latin composers
5 and publishers to the success cannot be underestimated.
6 We shall prove that ASCAP, BMI and SESAC are jointly
7 entitled to all 1982 and 1983 Jukebox Royalties, except
8 for all agreed upon settlement amounts with the Italian
9 Book Corp., and a few hundred dollars at most for LAM.

10 And this concludes my testimony.

11 Q You refer to the Many Worlds of Music that was
12 written in 1979, were you involved in the preparation of
13 that?

14 A I was not.

15 MR. DUNCAN: I have no further questions.

16 CHAIRMAN RAY: Commissioner?

17 EXAMINATION BY THE TRIBUNAL

18 BY COMMISSIONER AGUERO:

19 Q Mr. Anton, in your testimony you were employed
20 by William Morris as an agent or --

21 A As an attorney, sir.

22 Q And as an attorney with MCA?

23 A That's correct.

24 Q And in your exhibit you have an anthology of
25 the Latin music in here, directors, singers and you have

1 here a tremendous amount of composers and writers who have
2 already died -- George Murphy and Dennis Sims, and also
3 the famous Cuban composer Ernesto Lecuona, and Miquel
4 Aldez (phonetic), and also Jimmy Dorsey, (inaudible)
5 passed away last year in New York -- Carmen Miranda, also,
6 and many, many others.

7 In this testimony of yours are you using this
8 music to entitle the ASCAP and BMI jukebox royalties for
9 '82 and '83, based on this music, or some other music?

10 A Based on not only this music, but other music.
11 And this exhibit really shows the commitment of BMI to
12 Latin music over the past 40 years, and it certainly does
13 continue today.

14 Q But not with this repertoire, or with this
15 repertoire?

16 A Well, I would think that certainly partially this
17 repertoire is very important.

18 COMMISSIONER AGUERO: No more questions, Mr.
19 Chairman.

20 BY CHAIRMAN RAY:

21 Q Just a brief follow up of Commissioner Aguero's
22 comment. There are no problems for the Tribunal's concern
23 about the commitment of ASCAP, BMI or SESAC to Latin music,
24 however the most important thing is for us in this proceed-
25 ing to determine what percentage of the monies that come in

1 from jukeboxes, what percentage is to go to what particular
2 party. So, you can understand it is very difficult for us
3 to make our decision, unless we have some idea what were
4 the most performed songs during the years 1982 and 1983.

5 Do you understand that, Mr. Anton?

6 A Certainly, and I would address that by saying
7 that many of the songs written by and performed by people
8 mentioned in this exhibit were among the most performed
9 songs.

10 Q They were still being performed during those
11 years?

12 A They were still being performed in 1982 and '83.
13 I am sure we talked about the Breeze and I, Brazil, Yours,
14 the Girl from Ipanema and on and on, starting at the
15 beginning of the alphabet with Adios and ending with Yours,
16 from A to Y, yes, I would say that many of these standards
17 continued to be performed to a great extent.

18 Q Mr. Anton, in your opinion, where are most of
19 the jukeboxes located, or where were they located in 1982
20 and '83, in your opinion and your experience in the
21 business?

22 A (Pause)

23 Q Were they in hotels, were they in bars?

24 A I can't say, probably -- I am not that familiar
25 with where the jukeboxes were.

1 Q Then you possibly couldn't tell me if there is
2 a difference in "Hispanic communities" where jukeboxes are
3 located, and in the general communities, for instance,
4 country and western, or soul, in Black neighborhoods?
5 In other words, you cannot give us any idea as to where
6 the jukeboxes would be located in Hispanic areas?

7 The reason I am asking that I am trying to deter-
8 mine if jukeboxes in Hispanic neighborhoods are located in
9 areas where young people go, older people go, senior
10 citizen people go, or would they be pretty much in the
11 same areas that they would be located in the so-called
12 Black neighborhoods, for instance?

13 A I have no knowledge of this. I would assume
14 that -- I wouldn't understand why there would be any
15 difference.

16 Q Well, let me ask you one other question. It
17 would be helpful to me because are there any jukeboxes
18 located anywhere anymore?

19 (Laughter)

20 A That's a good question.

21 CHAIRMAN RAY: Okay, thank you very much.

22 MR. DUNCAN: Mr. Chairman, before cross, could
23 I just point out on page 3 of the witness's testimony,
24 line 4, SESAC was inadvertently omitted with the listing,
25 just an oversight.

1 CHAIRMAN RAY: Thank you.

2 Mr. Eisen.

3 CROSS-EXAMINATION

4 BY MR. EISEN:

5 Q I didn't have an opportunity --

6 CHAIRMAN RAY: I know you didn't on voir dire.

7 MR. EISEN: That's right. And, again, it is not
8 a question of voir dire, it is the relevance and the
9 admissibility of this witness's exhibit. I would be the
10 first to stipulate, or certainly enter into an agreement
11 that Latin American music has had a profound and a sub-
12 stantial impact on music in general in this country.

13 However, we are dealing with a 1976 document.
14 And Commissioner Aguero already raised certain infirmities
15 about this document, for that document to travel with this
16 record, again, is something that I think it totally ir-
17 relevant and any reviewing authority is not going to be
18 able to make a conclusion of law, based upon that document.

19 I won't even try to undercut the commitment
20 that SESAC may, in fact, have to Latin American music, but
21 to accept this witness's testimony premised upon this
22 1976 document that he didn't write, to me, is something
23 that is just wrong.

24 MR. DUNCAN: Your Honor, there is more to the
25 witness's testimony than just the exhibit. It is true

1 that his testimony is offered primarily to show the commit-
2 ment of BMI, and ASCAP and SESAC to Latin American music.

3 And counsel, by one of his earlier questions to
4 another witness, has made Mr. Anton's testimony all the
5 more relevant when he asked Ms. Messenger: this morning
6 whether a Latin composer might not prefer to go to a Latin
7 publisher, or a Latin performing rights licensing society.

8 So, it is all the more relevant to show that the
9 Music Claimants collectively have been interested in, and
10 have, in fact, been representing Latin American composers
11 for many, many years. And I submit the testimony is
12 relevant.

13 MR. EISEN: I don't want to beat a dead horse,
14 but there is no nexus between Ms. Messenger's statement
15 and the objection that I had.

16 To ask to deal and ask to rely upon a 1976
17 document that is already defective, because of the fact
18 that there are people included in there who no longer
19 exist. Why do we need it? Why must it travel with the
20 record?

21 CHAIRMAN RAY: It is not necessary for people to
22 exist, as long as the music exists.

23 MR. EISEN: That's very true. But furthermore,
24 the commitment itself is not what is at issue here. I
25 don't discount the fact that any performing rights society

1 may, indeed, have a commitment, but that is not an issue.

2 If this exhibit had been restructured in someway,
3 so that this witness was able to show that during 1982 and
4 1983, specific composers and specific copyrighted matter
5 was carried on jukeboxes, or even in the media -- radio,
6 television, whatever, that's another story. But just to
7 wholesale put in a document like this, which is already
8 ancient, to me has no relevance whatsoever.

9 And I don't think a reviewing authority would
10 find it relevant either. It is interesting, but to make
11 a conclusion of law based on that document is virtually
12 impossible.

13 MR. DUNCAN: Your Honor, I don't want to belabor
14 the point. The document itself was put in for the reasons
15 I have stated, which were in part historical. This
16 witness's testified that music listed in those documents
17 were performed in '82 and '83, and we have submitted other
18 evidence as to what was performed in '82 and '83.

19 MR. EISEN: I would not have an objection, if
20 this witness were able to rehabilitate the exhibit to the
21 extent that he was able to show exactly what songs were
22 played in 1982 and 1983.

23 I would like to ask him a couple of questions
24 concerning that, but --

25 CHAIRMAN RAY: Why don't you do that, sir?

1 BY MR. EISEN:

2 Q All right, I would ask the witness whether or not
3 he is able to take this exhibit that he has supplied to
4 the Tribunal, and whether or not he would be able to
5 isolate and locate those materials within that exhibit
6 that he believes reasonably were played in the media in
7 1982 and 1983?

8 A I think I would be able to identify some.

9 Q Do you have a copy of the exhibit?

10 A Yes, I do. I would also need to have the exhibit
11 -- I can look at some of these very quickly and say that
12 from my memory -- I think I did look at the Appendix, and
13 just on the very first page, entitled Latin Dimension,
14 there are several songs listed -- Amor, Besame Mucho,
15 Frenesi, Granada, Green Eyes, Maria Elena and Perfida are
16 all part of the list of most performed songs for both of
17 the years, 1982 and 1983.

18 Shall I go on?

19 Q Well, I asked that you identify all that exist
20 in the exhibit.

21 A (Perusing document) The song Siboney, mentioned
22 on page 7, appears in the exhibit. The song El Manisero,
23 the Peanut Vendor, appears in the exhibit.

24 Q I'm sorry, Mr. Anton, what page is that on?

25 A On page 8. On page 11, the song The Breeze and I

1 appears in the exhibit. As does -- I take that back, the
2 song The Breeze and I appears in the exhibit. I believe
3 I have mentioned Frenesi, Green Eyes, and Yours already.
4 Babalu, again on page 11, it appears in the exhibit.

5 MR. DUNCAN: Your Honor, we can continue, but I
6 would submit that that establishes nearly every song in
7 here that is on the '82-'83 list.

8 THE WITNESS: Indeed, every song that I have
9 mentioned here --

10 CHAIRMAN RAY: Mr. Eisen, is that in answer to
11 your question?

12 MR. EISEN: Well, I will say this, if counsel
13 represents that, indeed, that is the case, I see no reason
14 to continue this line of questioning.

15 MR. DUNCAN: I cannot represent that of my own
16 knowledge. If I could consult with someone --

17 MR. EISEN: I wonder if there isn't an easier
18 way to do that. I would withdraw my objection to this
19 exhibit, if counsel and the witness could, at sometime in
20 the near future, put their heads together and come up with
21 a list --

22 CHAIRMAN RAY: And provide Counsel and the Tribunal
23 a list of that.

24 MR. DUNCAN: We can do that, sir.

25 CHAIRMAN RAY: That's the way we shall do it.

1 Anymore questions?

2 BY MR. EISEN:

3 Q At page 3 of your testimony, Mr. Anton, you
4 mention some of the titles that you have already indicated,
5 are played with great frequency. Do you have any direct
6 information with regard to whether or not these particular
7 songs are manufactured on 45 rpm records?

8 A No.

9 Q So, you don't have any direct knowledge as to
10 whether or not records with these songs on them are
11 actually included in jukeboxes?

12 A I would have to say that based on our survey,
13 which one of our other BMI representatives will be talking
14 about later, that I would have to assume that these songs
15 are, indeed, appearing on jukeboxes.

16 Q Yes, but you have no direct knowledge of that
17 yourself?

18 A No.

19 MR. EISEN: Thank you. That's all I have.

20 MR. DUNCAN: One question on redirect.

21 REDIRECT EXAMINATION

22 BY MR. DUNCAN:

23 Q Based on your knowledge of the music business,
24 generally, in which you have been for many years, would
25 you have any reason to doubt that the songs you have

1 mentioned have, in fact, been put on 45 records and are
2 played in jukeboxes?

3 A Absolutely not.

4 MR. DUNCAN: That's all I have.

5 CHAIRMAN RAY: Well, thank you, Mr. Anton. I
6 hope you have a nice, safe trip back home.

7 (Whereupon, the witness was excused)

8 CHAIRMAN RAY: We will recess until 2:00 o'clock.

9 (Whereupon, the luncheon recess was taken at
10 12:30 p.m., to reconvene at 2:00 p.m.)
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AFTERNOON SESSION

(2:00 p.m.)

CHAIRMAN RAY: Back on the record. Mr. Koenigsberg?

MR. KOENIGSBERG: Thank you, Mr. Chairman. Before we proceed with our next witness, Paul Adler, Mr. Eisen and I had a conversation after the recess was called, about that Italian Book Company stipulation that I had referred.

Bruce, why don't you --

MR. EISEN: In fact, I had two preliminary matters to raise. The first is that there was some discussion about a proposed and unexecuted stipulation that involved the status of the Italian Book Company in this proceeding.

I mentioned on the record earlier that I had no recollection of having received that document. Checking with my secretary at the luncheon break, I learned that I was misinformed. This shows that secretaries really do run the office. In fact, that document is in my office, unexecuted, as counsel agreed.

So, to the extent and to otherwise, I apologize, it is in my office, and if there is any use to be made of it at a later date, at least it is repositied there for my consideration, too.

Secondly, counsel has --

CHAIRMAN RAY: Excuse me. On that point, will

2 1 the Tribunal be advised by the parties prior to the close
2 of this proceeding, as to whether this is going to be ex-
3 ecuted?

4 MR. KOENIGSBERG: Mr. Chairman, I will undertake
5 to call Mr. Angel and find out exactly where the matter
6 stands and report back to you, if not today, then certainly
7 on Wednesday, assuming I can get through to him, yes, sir.

8 CHAIRMAN RAY: Very good. And then you will
9 provide us with whatever decision you, Mr. Eisen, will
10 make?

11 MR. EISEN: Yes.

12 CHAIRMAN RAY: Very good. Then the second pre-
13 liminary --

14 MR. EISEN: Just a very short preliminary matter.
15 Counsel had asked for some translations of information
16 that appears in ACEMLA's Attachment 2 in its direct case,
17 and I would like to provide both the Tribunal and counsel
18 with some of the translations that appear.

19 CHAIRMAN RAY: Very good. Thank you.

20 MR. KOENIGSBERG: Mr. Chairman, counsel has said
21 that these are some of these translations. Are these not
22 all of the documents translated?

23 MR. EISEN: That's all I've got at this point.
24 I will do this. If there is further information -- and I
25 believe the only documents that you did request related to

3

1 Attachment 2 -- if there is any further information I can
2 gather in translated form, I'll certainly provide it to you
3 and the Tribunal.

4 MR. KOENIGSBERG: I ask merely because there are
5 four documents in Attachment 2, and this would appear to
6 be translations of three of them.

7 MR. EISEN: That's correct.

8 MR. KOENIGSBERG: So, there is one of them yet
9 to be translated.

10 MR. EISEN: Your assumption is correct.

11 CHAIRMAN RAY: The record will note that. All
12 right. Mr. Koenigsberg?

13 MR. KOENIGSBERG: Mr. Chairman, our next witness
14 is Paul Adler, and I would ask that he be sworn at this
15 time.

16 CHAIRMAN RAY: Mr. Adler, thank you for appearing
17 before us.

18 Whereupon,

19 -PAUL ADLER

20 was called as a witness and, having first been duly sworn,
21 was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. KOENIGSBERG:

24 Q Would you state your name for the record, please?

25 A My name is Paul S. Adler.

4 1 Q And your current position, please?

2 A I am ASCAP's Director of Membership.

3 Q And would you outline for the Tribunal your edu-
4 cational background, your career experience, and the duties
5 in your present position?

6 A I received my Bachelors degree from Oberlin
7 College, my LLB from Columbia University Law School, my
8 LLM from New York University Law School. I then spent
9 approximately three years with the government, first with
10 the Department of Justice and then with the independent
11 commission, the United States Commission on Civil Rights.

12 I came to ASCAP in 1967, starting out in the
13 society's legal department. About a year or so later, I
14 moved over to the business side, and have been on the
15 business side of the organization since then, first as the
16 assistant to the then Director of Distribution, subsequent-
17 ly became the Director of Distribution. After a very short
18 period away from the society in private practice, I came
19 back to the position of Director of Membership.

20 In that position, I am currently responsible for
21 two areas of the society's operation; on the one hand,
22 that part of the operation that goes out and seeks to sign
23 up new writer and publisher members, and to provide assis-
24 tance to them in the day-to-day running of the society,
25 trying to do problem-solving for them.

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5 1 The other part of the job deals with the super-
2 vision of those parts of the society's operation that deal
3 with the maintenance of information about what works are
4 in the society's repertoire and the distribution of royal-
5 ties to the society's members and the members of foreign
6 societies who license through us, including the work that
7 deals with the survey of performances and the distribution
8 of money based on that survey.

9 CHAIRMAN RAY: Let me ask you, as the Director
10 of Membership, does that include publisher membership and
11 writer membership?

12 THE WITNESS: Yes, it does.

13 CHAIRMAN RAY: And in your relationship with
14 foreign societies, actually what do you do in the U.S. for,
15 say, a foreign society in Mexico?

16 THE WITNESS: Well, what we do in the U.S. for
17 any foreign society is maintain a record of performances
18 of works in their repertoires, in their catalogs, that we
19 license in the United States on their behalf. We are
20 obligated under our bilateral agreements with them, to re-
21 mit money to them for works of their members that are per-
22 formed in our survey.

23 CHAIRMAN RAY: Could you explain for the record,
24 for me, what is the difference between a music publishing
25 company, an American music publishing company, that has an

6 1 arrangement to represent a foreign publisher in the U.S.A.
2 What would be the difference between that and your relation-
3 ship with a foreign society of which perhaps that publisher
4 is also a member of that foreign society, but is repre-
5 sented in the United States by another publishing company?

6 THE WITNESS: By a local sub-publisher. Well,
7 typically, the arrangements in the music business are that
8 a local sub-publisher represents the originating publisher
9 in the foreign territory, and typically, although not uni-
10 versally, not uniformly, collects the full publisher's
11 share of any performance royalties due for performances
12 of that originating publisher's works.

13 So, if a work comes into the society's survey
14 of performances and it is a work of foreign origin, we
15 would look to our records to see, for example, whether
16 the American sub-publisher is entitled to receive the
17 full publisher's share. If so, we would pay the full
18 publisher's share to our American member.

19 CHAIRMAN RAY: And then the American member, in
20 turn --

21 THE WITNESS: Pays it directly to his originating
22 publisher.

23 CHAIRMAN RAY: Thank you. Go ahead. I'm sorry.

24 MR. KOENIGSBERG: Not at all, Mr. Chairman, I
25 appreciate it.

7 1 BY MR. KOENIGSBERG:

2 Q Your written statement talks of four topics on
3 which your testimony is being presented, at the bottom of
4 the first page. Why don't you simply summarize those for
5 the Tribunal in terms of what your testimony will encom-
6 pass today?

7 A We took the titles that Latin American submitted,
8 approximately 179, as their most performed titles that they
9 submitted in accordance with the Copyright Royalty Tri-
10 bunal's request, and ran them through the ASCAP survey of
11 performances, to see, in 1982 and '83, what these titles
12 would have generated in credits under our system.

13 Q So, that's one topic of discussion. What are
14 the other three in your testimony?

15 A The obverse of that, or the performance track
16 record of the ASCAP, BMI and SESAC, and analysis of ASCAP,
17 BMI and SESAC works on various trade paper charts in '82 and
18 '83, again, in response to some suggestion by the Tribunal
19 that looking at charts would be one measure of determining
20 share, and then some of our prior dealings with the Latin
21 American Music -- and you will have to forgive me, I have
22 a head cold, so if you can't understand me, tell me.

23 Q Your appearance today is to support the joint
24 claim of ASCAP, BMI and SESAC, is that correct?

25 A Correct.

8 1 Q Do you have any corrections that you would like
2 to make to your testimony?

3 A Yes, I do, in fact. If you would turn to page 3,
4 Roman numeral IV, Analysis of Trade Paper Charts, the
5 second sentence there says, "We looked at Billboard and
6 Replay charts which purport to measure retail store record
7 sales and one-stop sales reports not performances".

8 In fact, in '82 and '83, the Billboard Hot 100
9 chart, in any event, was purported to be based in part on
10 radio station play lists as well as the retail store record
11 sales and one-stop sales reports. So, there is some per-
12 formance component in that Hot 100 chart.

13 CHAIRMAN RAY: Radio performance.

14 THE WITNESS: Right. Then on the bottom of page
15 2, Roman numeral III, it says, "Based on my experience of
16 approximately 16 years in ASCA's membership", et cetera --
17 I did some counting on my fingers this morning, and it's
18 really closer to 18 years, which just shows you that time
19 flies when you're having fun.

20 MR. KOENIGSBERG: Mr. Chairman, we offer Mr.
21 Adler for any voir dire at this time.

22 CHAIRMAN RAY: Mr. Eisen?

23 MR. EISEN: As before, Mr. Chairman, I have no
24 voir dire. I do have objections to the exhibit.

25 CHAIRMAN RAY: All right. Let's use this time

9 1 for that.

2 MR. EISEN: My objections are very limited. In
3 fact, I object to all of Section V of the witness' state-
4 ment, beginning at the bottom of page 4. Once again, I
5 believe that we're dealing with material that's wholly
6 irrelevant to the task that the Tribunal has to confront.
7 His relationships with ACEMLA had nothing to do with whether
8 or not ACEMLA's entitled to a portion of the fund. Not
9 only are the irrelevant, I find them to be inflammatory.
10 Certainly, they don't advance the record in this proceeding
11 one iota.

12 CHAIRMAN RAY: Mr. Koenigsberg, comments?

13 MR. KOENIGSBERG: Yes, sir. We certainly do
14 think they advance the record in these proceedings in
15 several ways. First, they give the Tribunal some indication
16 of the history of Latin American's music's track record.
17 There is a background here that the Tribunal should know
18 about.

19 Secondly, part of their case involves claims
20 about requests to broadcasters for licenses and claims
21 about whether broadcasters are performing their works or
22 not, and this testimony goes directly to that issue, an
23 issue that they, themselves, have put in here -- an issue,
24 by the way, that we did not know they were going to put
25 in but, fortuitously, it seems to me, for the Tribunal's

10 1 purposes, they did, so it's right on the beam. And I cer-
2 tainly think that for those reasons alone, this testimony
3 is quite relevant.

4 MR. EISEN: This is not rebuttal. We're dealing
5 with the direct case of one witness that ASCAP has produced.
6 My objection remains. It's not going to advance the record
7 at all. Furthermore, it's based on hearsay, and I don't
8 think it has any relevance.

9 CHAIRMAN RAY: In this case, Mr. Eisen, the
10 Tribunal sustains the objection, and that portion of the
11 direct will be deleted.

12 MR. EISEN: I have no further objections.

13 CHAIRMAN RAY: Mr. Koenigsberg?

14 BY MR. KOENIGSBERG:

15 Q Now, Mr. Adler, you've stated and your written
16 evidence states that you took the list of IAM songs which
17 they claim were most performed and ran them through ASCAP
18 survey records for calendar years '82 and '83 -- this is
19 at the top of page 2 of your written statement -- and you
20 note that you've provided a description of the ASCAP survey
21 to the Tribunal in the filing of June 24, '85, which is
22 incorporated into your testimony by reference.

23 I wonder if briefly you would tell the Tribunal
24 how the ASCAP survey works, touching especially on the
25 points of its operation that you think are important for

11

1 this proceeding.

2 A To begin at the very beginning, when the survey
3 was originally designed, it was reviewed not only by the
4 Department of Justice, but by the Bureau of the Census of
5 the Department of Commerce, by federal courts, and continues
6 to be reviewed by the Department, the courts and two dis-
7 tribution advisors appointed by the Federal District Court
8 for the Southern District of New York. And, in addition,
9 of course, it gets the review of our outside independent
10 survey experts.

11 One of the things that had to be addressed when
12 the survey was originally designed was the question of how
13 you incorporate and make sure you incorporate the wide
14 diversity of music that's played in the United States, not
15 only a concern that you have for your own membership, which
16 represents a diverse group of songwriters and publishers,
17 but the members of foreign societies who license in the
18 United States through us because we represent performing
19 right organizations from the U.K. to the U.S.S.R., across
20 Europe as well as many performing right organizations in
21 South America. So, the survey is a random, stratified,
22 disproportionate survey, stratified in the sense that we
23 take our sampling cells from all across the country, to
24 take into account the fact that performances in Texas
25 may be different to some extent than performances in New

12 1 Hampshire. Obviously, you would expect some Spanish music
2 in Texas that you wouldn't expect in New Hampshire, that
3 performances in New York or Puerto Rico are going to be
4 different than performances in Montana; disproportionate
5 in that the survey is designed to assign sampling to sta-
6 tions in relation to their ASCAP license fees -- the bigger
7 the station, the greater the license fees -- random in the
8 sense that stations have equal chance of coming -- stations
9 of equal size have an equal chance of coming into the
10 society's survey.

11 The sample consists of 60,000 hours of local
12 radio performances, 30,000 hours of local television per-
13 formances, a complete count of performances on the tele-
14 vision networks, and surveys of various other licensees --
15 background music services such as Muzak, airlines, for
16 example, are surveyed, colleges and universities' per-
17 formances in concert halls, several serious music per-
18 formances in concert halls -- gives you the breadth of the
19 survey.

20 The survey of local radio, the focus on that is
21 done by means of tape recordings that the society's staff
22 takes in the field 365 days a year, and randomly, around
23 the clock, without the foreknowledge, without any knowledge
24 actually of the stations being taped.

25 The tapes are then sent back to New York and .

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13

1 there is a staff of listeners who listen to the tapes and
2 write down the titles of the works that they can identify.

3 I think earlier this morning, Ms. Messenger made
4 a reference to solfeggio cards. To the extent that a work
5 is not identified immediately in the survey, these cards
6 are made out. They are really a form of musical alphabeti-
7 zation. Instead of going by alphabet, you go by the musi-
8 cal scale -- do, re, mi, fa, sol, la, ti, do -- and you
9 can subsequently identify, and we do subsequently identify
10 very frequently, works that way.

11 The survey also processes, or in processing the
12 survey, we take in all the works that we hear and identify,
13 so we keep a record of works that we do hear, regardless
14 of whether it is licensed by ASCAP at that time. Works
15 may subsequently come into the repertoire that were not
16 in the repertoire at the time they are initially picked
17 up, and we keep a record of everything.

18 CHAIRMAN RAY: One question on that, Mr. Adler.
19 Do you know, to your knowledge, if you have any records
20 on surveys of "Hispanic" stations in 1982 and '83?

21 THE WITNESS: I'm sure we do.

22 CHAIRMAN RAY: Do you know approximately how many
23 Hispanic stations were surveyed in '82 and '83?

24 THE WITNESS: I couldn't give you that answer
25 off the top of my head, but we certainly know that.

14

1 COMMISSIONER AGUERO: How many stations, Hispanic
2 stations, are there in this country?

3 THE WITNESS: Oh, I can't -- I don't know. One
4 of the problems with answering the question is that it's a
5 fluid kind of thing, in any event. Stations change their
6 formats. And I ought to point out that the survey is de-
7 signed in a way that is colorblind and format-blind.

8 We are not seeking to sample stations because
9 they have particular kinds of formats, or we don't look
10 to survey specifically stations that program black music,
11 or Spanish music, or any particular kind of music.

12 CHAIRMAN RAY: But in your final analysis, do
13 you have a breakout of those kinds of information, those
14 kinds of data?

15 THE WITNESS: We could do some work to get back
16 to it, but I can't give you an answer about --

17 CHAIRMAN RAY: But you don't do it ordinarily?
18 There's no reason for you to do it ordinarily.

19 THE WITNESS: No, there's no reason to do it
20 ordinarily.

21 CHAIRMAN RAY: Thank you. Go ahead.

22 BY MR. KOENIGSBERG:

23 Q Now, further in your written direct statement,
24 Mr. Adler, on page 2, you incorporate the details of the
25 findings concerning performances of LAM works in the ASCAP

15

1 survey in 1982 and 1983, which were set forth in the filing
2 of September 3, 1985, and you incorporated that filing by
3 reference.

4 I wonder if you would please run through those
5 findings for the Tribunal, so that the Tribunal knows what
6 the results are.

7 A We are talking here, Fred, about Table 4, to
8 make sure we are all talking about the same thing.

9 MR. KOENIGSBERG: Mr. Chairman, Commissioner
10 Aguero, do you have that filing in front of you?

11 CHAIRMAN RAY: Yes.

12 BY MR. KOENIGSBERG:

13 Q You are referring, Mr. Adler, to Table 4 on
14 page 5.

15 A Yes. Just to take you through it very quickly --
16 you all can read it as well as I -- we start with the
17 first line, taking for 1982, for example, being the total
18 royalty fund : available for distribution, excluding inter-
19 est. We then took, as a hypothetical share -- as you know,
20 the ASCAP, BMI, SESAC shares are confidential -- took an
21 ASCAP hypothetical share of 50 percent. Then we ran the
22 LAM -- take the Latin American Music works through our
23 survey in '82, both as a percentage of all credits for all
24 media that we survey, and then as a percentage of ASCAP
25 credits in radio only, and those percentage figures are

16

1 shown on lines 3 and 4 of the table for both '82 and '83.

2 And then to determine a possible appropriate
3 award for Latin American Music, assuming they were entitled
4 to anything, we say, well, let's look at their share of
5 the credits as a percentage of all credits, in all media,
6 or as a percentage of just radio credits, take those two
7 percentages, so it would be line 2 times line 3, or line
8 2 times line 4, to give you the calculation.

9 And for 1982, we go from \$157.01 to \$326 and
10 change, depending on whether you use all credits or just
11 radio credits, and then '83, we talk about \$112 and some
12 cents to \$266, let's call it, depending again on whether
13 you use all credits or just radio credits.

14 CHAIRMAN RAY: So, results obviously show that
15 when you use radio only survey, that is to the advantage
16 of LAM?

17 THE WITNESS: Yes.

18 BY MR. KOENIGSBERG:

19 Q And why would that be, Mr. Adler? Why, if you
20 used radio only, would Latin American come up with a higher
21 number than if you used all media?

22 A Well, of course, you're going to be using a
23 smaller base. In '83, for example, all of LAM's credits
24 were local radio performances. We didn't pick up any per-
25 formances of Latin American Music's works in any other media.

17 1 Q Let's turn to the second topic that you indicated
2 you would testify about, the performance track record of
3 ASCAP, BMI and SESAC. Based on your experience of 18 years
4 in this area, what can you tell the Tribunal about the per-
5 formances of ASCAP, BMI and SESAC works?

6 A Well, I think, really, for all practical pur-
7 poses, there is virtually nothing that is performed of any
8 consequence, that is not in the repertoires of ASCAP, BMI
9 or SESAC either directly, by virtue of our own members
10 having written or published the works, but by virtue of
11 the fact that they represent the catalogs of all the
12 foreign societies as well.

13 Q The third topic of your testimony is an analysis
14 of trade paper charts. With this put in, let me ask you,
15 first, to show anything about Latin American's claims or
16 was it put in as an affirmative piece of evidence for
17 ASCAP, BMI or SESAC?

18 A It's part of the society's and BMI's and SESAC's
19 affirmative claim.

20 Q Would you give us your views on looking at charts
21 and tell us what sort of analysis you did?

22 A Let me just start off by pointing out that in
23 the case of Billboard, as I said at the outset, that it
24 is -- in '82 and '83, only one of their charts, the Hot 100
25 chart, was indicated to have an airplay component -- that

18 1 is, a play list component -- and I think it's probably
2 a fair inference if this work appears on a radio station
3 play list, it's going to get played to some extent.

4 They do not indicate whether that is a component
5 in their other charts in '82 and '83, although it appears
6 to be a component of their current charts, but in '82 and
7 '83, the airplay issue comes up, is referred to only in
8 their Hot 100 charts.

9 We have three other charts that we looked at.
10 One is called the Adult Contemporary chart, used to be
11 called the Easy Listening chart; the other is the Black
12 chart, used to be called the R&B chart; and the third is
13 the Country charts.

14 The replay charts which we referred to are charts
15 that are put out by the jukebox industry and I understand
16 that they purport to represent sales or one-stop sales
17 reports, and are not based on any other kind of airplay
18 consideration.

19 CHAIRMAN RAY: In 1982 and '83, did Billboard
20 have a chart broken down for sales of Latin music?

21 THE WITNESS: Billboard has had charts over the
22 years that are album as opposed to singles charts. I
23 should perhaps mention that the charts I'm referring to --
24 the Hot 100, Black and so forth -- are singles charts, and
25 I think that's important because I think typically that's

19

1 what is going to end up in the jukebox, to some extent,
2 and the hits of the day, and those are going to be singles.

3 The charts that Billboard has published, and still
4 does publish from time to time, for dealing with Latin
5 music are album charts. They come out irregularly in the
6 sense that they are not in every week, and they choose
7 different cities for their reports. You may have one time
8 it comes out for Chicago, another time may come out for
9 Los Angeles, another time may come out for Miami and so
10 forth. And, of course, one of the problems you have with
11 an album chart is that it doesn't tell you what specific
12 single or singles from the album is getting airplay. It's
13 going to tell you that the album is selling. The album
14 may be selling and nobody is playing anything from it as
15 singles.

16 BY MR. KOENIGSBERG:

17 Q What I'd like to do now, Mr. Adler, is refer to
18 the results of this analysis of the trade paper charts.
19 Let's first look at Exhibit 1, Analysis of Billboard Charts
20 in 1982.

21 A May I, before you do that -- I was just looking
22 at the written statement, and there's one other point I
23 think I should make about these charts because I think it
24 may also address itself to a question that the Tribunal
25 has been concerned about a little bit.

20

1 The charts don't deal with -- they deal with
2 what is currently popular, and that's very important. They
3 don't, of course, deal with the standards, the oldies, the
4 songs that live on after the man or woman or men and women
5 who wrote them have died. And so there are an awful lot
6 of songs that continue to get performed on a regular
7 basis that are not going to be reflected on these charts
8 unless, of course, they get a new cover recording and become
9 a hit song all over again.

10 Q Is that the case in jukeboxes as well as in other
11 media, when you talk about standards and oldies?

12 A I would certainly think so. I certainly don't
13 prowl all the jukeboxes, but I do get exposed to jukeboxes
14 in various parts of the country when I travel with my
15 family and when I travel alone, and you see sometimes
16 where you have separate sections that are standards or
17 oldies, just as they might have separate sections that
18 might deal with particular parts of the repertoire that
19 a local establishment might think would be appealing to
20 its customers, polkas or something else of that sort.

21 Q Let's take a look at Exhibit 1, the Analysis of
22 Billboard Charts in 1982. Would you run through those
23 numbers for the Tribunal.

24 A Yes. I think what you see is the Hot 100 chart
25 was a listing of 100 songs, 52 weeks of them, the Country

22

1 A Correct.

2 Q Let's take a look at Exhibit 3, the Analysis of
3 Replay Charts in 1982. First, would you explain the foot-
4 note on the number of available listings?

5 A That's what we had. We don't, in the normal
6 course, have recourse to the replay charts, and we had
7 available 28 charts for '82 and I believe it was 26 for
8 '83, and so we looked at what we had.

9 Q And, again, how many replay charts are there?

10 A There are three. There is a Pop chart, a Country
11 chart, and what they call and R&B chart.

12 Q Well, let's focus, first, on '82. What percentage
13 of each of those charts was licensed by ASCAP, BMI and
14 SESAC?

15 A 100 percent.

16 Q And turning to Exhibit 4, what percentage of each
17 of those charts was licensed by ASCAP, BMI and SESAC in
18 1983?

19 A 100 percent.

20 Q Mr. Chairman, I think the point has come for us
21 when I will ask Mr. Adler to summarize, in few words, his
22 testimony to you.

23 A Well, I think, really, the sum and substance of
24 it is that, from our affirmative case side, I think that
25 the evidence that we have and my experience in dealing with

21

1 and Black charts the same, and the Adult Contemporary chart
2 is a chart of 50 titles, and out of that entire listing
3 for the year, every title on those charts was licensed
4 either by ASCAP, BMI or SESAC.

5 Q 100 percent on each of those four charts?

6 A 100 percent, that's correct.

7 Q Let's take a look at Exhibit 2.

8 A In Exhibit 2, we have the same thing except for
9 three titles that are on the Country charts for three songs
10 that were on the charts for a total of ten weeks where
11 we apparently have a work -- three works that do not appear
12 at this point, in any event, to be in our repertoires. Our
13 computer has tried to pin it on BMI, but BMI denies it, so
14 at this point, I can't tell you who they are, who the
15 writers are, except I suspect they are not Hispanic, and
16 I suspect eventually someone is going to get an index card
17 from the publisher who has had those songs saying, "Why
18 haven't I been paid?"

19 Q So, 100 percent of the Hot 100; 100 percent of
20 the Black, and 100 percent of the Adult Contemporary charts
21 were in the ASCAP, BMI and SESAC repertoires, is that your
22 testimony?

23 A Correct.

24 Q And virtually 100 percent of the Country reper-
25 toire -- Country chart?

23

1 this for an awfully long time, is that there is really
2 nothing of any consequence that we don't license, we three
3 performing right societies, and looking at the claim from
4 Latin American, that to the extent that what they identify
5 as a representative sample of their top Spanish-language
6 songs in their catalog that they generate, in our survey,
7 are a very insignificant number of credits in relation to
8 the total.

9 MR. KOENIGSBERG: Mr. Chairman, if you or Com-
10 missioner Aguero have any questions, Mr. Adler is available
11 for you and for cross-examination.

12 CHAIRMAN RAY: Commissioner Aguero?

13 COMMISSIONER AGUERO: No questions, Mr. Chairman.

14 CHAIRMAN RAY: I have one question. With the
15 exception of LAM, do you know of any other performing
16 rights societies in the U.S.A.?

17 THE WITNESS: No.

18 CHAIRMAN RAY: Only the three?

19 THE WITNESS: Correct.

20 CHAIRMAN RAY: Thank you. Mr. Eisen?

21 CROSS-EXAMINATION

22 BY MR. EISEN:

23 Q Let me pick up on that question, Mr. Adler. How
24 do you define a performing rights society?

25 A I think an organization that is equipped and able

1 to seek out and license the some 8,000 local radio stations
2 in the United States, the some 800 local television stations,
3 the hundreds of thousands of other kinds of users -- bars,
4 grills, nightclubs, theme parks, concert establishments,
5 college and educational licensees, which I didn't mention
6 earlier but we have them -- that has the resources to take
7 the information collected from its surveys in order to see
8 that the writers and publishers are appropriately paid.
9 So, I think it's got to be an organization that is sub-
10 stantial, can reach out, has the staff to reach out and
11 find and track thousands upon thousands of users, has the
12 staff and the organization to police the license, to see
13 that people who don't pay their license fees or who are
14 delinquent in their license fees do pay them, and to see
15 that the money collected is properly distributed to the
16 people it represents in appropriate fashion -- and when
17 I say the people it represents, I mean the whole universe
18 of people. I suppose if I had more time, I could think
19 of more things.

20 Q I think you've done admirably well. So, can I
21 take it as your testimony that before you are willing to
22 agree that an entity is a performing rights society, it's
23 got to be big, it's got to be equipped to do all those
24 things you just mentioned a performing rights society
25 should do on behalf of copyright holders?

1 A Well, I suppose -- you know, big is a relative
2 term. ASCAP, I think, is probably bigger than SESAC in
3 terms of the number of people we employ --

4 CHAIRMAN RAY: How about if you compare with
5 BMI?

6 THE WITNESS: I don't really know.

7 (Laughter.)

8 I could tell you this, it's smaller than PRS,
9 which is the British society, but I think it has to have
10 a staff sufficient to do those tasks which I outlined.
11 People could disagree, I suppose, about how big that staff
12 should be. It's got to be more than one or two.

13 BY MR. EISEN:

14 Q Do you know what Congress has defined a perform-
15 ing rights society to be?

16 A Congress, I know, has listed ASCAP and BMI and
17 SESAC as examples of performing rights societies.

18 Q Are you familiar with section 116?

19 A Not from memory, no, I'm not.

20 Q You aren't. Do you know whether or not that
21 section has anything to do with whether or not a given
22 performing rights society is well equipped to do the things
23 that you mentioned a performing rights society must do?

24 MR. KOENIGSBERG: Mr. Chairman, I'll object to
25 that question as calling for a conclusion of law here.

1 The arguments about what the law says are left counsel,
2 Mr. Adler is a witness.

3 CHAIRMAN RAY: However, Mr. Adler has had a back-
4 ground in law and is an expert in the field of copyright.
5 At least I would like Mr. Adler to make an attempt to
6 answer that.

7 THE WITNESS: Well, since I haven't read that
8 section.

9 BY MR. EISEN:

10 Q So, it's fair to say that when you defined a
11 performing rights society, that's purely your own defini-
12 tion?

13 A That's correct.

14 Q Let me refer you to Section II, page 2 of your
15 testimony, and to the last paragraph under Section II.
16 You mentioned previously radio performances. I believe
17 you even mentioned concerts on college campuses. Can you
18 be specific with regard to what you mean in that paragraph
19 by "all media"?

20 A Yes, I think I can. That would include radio;
21 television, both local and network; wired -- what we call
22 wired music services, which means essentially background
23 music services, such as Muzak, Seaberg, Magnatronics,
24 Custom Music, and those are, in fact, the background
25 music services that I had in mind -- I'm trying to think

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1 if anything else would be included -- performances on --
2 no, I think that covers it pretty generally. I may have
3 dropped somebody out of there, but that's the bulk of them.

4 Q But the survey that ASCAP used to reach the
5 conclusions at paragraph 2 of Section 2 of your statement,
6 was at least in part based on radio performances, is that
7 right?

8 A Oh, absolutely.

9 Q And I believe in response to a question from the
10 Chairman, you stated you didn't know how many of these
11 stations involved in the survey were Spanish-speaking
12 stations?

13 A That's correct.

14 Q Well, I'd like to ask how you can reach the con-
15 clusions based in that paragraph, on a survey that did not
16 include a known number of Spanish-language radio stations?

17 MR. KOENIGSBERG: Mr. Chairman, I don't think
18 Mr. Adler said that there wasn't a known number of Spanish-
19 language stations, I believe he said he did not know the
20 number.

21 MR. EISEN: Why can't the witness construe the
22 question exactly as counsel just put it because that's what
23 I was asking.

24 CHAIRMAN RAY: Yes.

25 BY MR. EISEN:

1 Q You do not know the number of radio stations with
2 Spanish-speaking formats that were included in this survey,
3 is that correct?

4 A That's correct.

5 MR. EISEN: In view of the witness' testimony,
6 I would request the Tribunal to take official notice of
7 the 1985 Broadcasting Yearbook, which includes well over
8 200 radio stations which, at the time that yearbook was
9 compiled, had Spanish-speaking formats.

10 To the extent that survey isn't quantifiable
11 insofar as those radio stations are concerned, I would
12 move to strike any material in this survey that relates
13 to radio station performances.

14 MR. KOENIGSBERG: Mr. Chairman, first of all,
15 as to the Tribunal's official notice of the 1985 Broadcast
16 Yearbook, I think you also have in the cable proceeding
17 those pages from the 1983 Broadcast Yearbook, so there's
18 no problem about putting those in.

19 As to the motion to strike, however, Mr. Adler
20 has testified as to the basis of the ASCAP survey. He's
21 testified as to the basis for the selection of the sample
22 of radio stations in that survey, and there is no -- the
23 conclusion that I think Mr. Eisen is trying to draw simply
24 isn't there, so that the motion to strike --

25 MR. EISEN: He's unable to testify as to the

1 random sampling of radio stations included in the survey
2 that included Spanish-speaking stations. I would submit
3 that the value of any such survey in this particular pro-
4 ceeding is unable to draw a nexus between the radio stations
5 surveyed and the amount of Spanish-language programming
6 at issue is inconsequential. It has no meaning. It will
7 not enable the Tribunal to make any finding of fact based
8 on this survey that is relevant under the remand order.

9 This is not the first time this has come out,
10 and I recognize the informality, and I recognize the as-
11 sumptions and inferences that also have to be drawn as the
12 result of evidence adduced in this proceeding, but when
13 a survey is presented to show a dispositive such as ASCAP
14 is trying to prove here, and has no connection, no nexus,
15 to the prime media that would include performances of
16 Spanish-language programming, it just does no good.

17 MR. KOENIGSBERG: Mr. Chairman, Mr. Adler has
18 testified that there are 60,000 hours of radio broadcast
19 time that were surveyed, and that Spanish-language pro-
20 gramming is represented in that survey, based on standard
21 survey rules to the extent that it exists.

22 Now, he doesn't know what every station, what
23 every hour of that surveying has been done, it would be
24 ludicrous to expect him to, but he does know how the survey
25 is conducted, and he's testified to that. And a nexus is

1 quite clear and quite strong and quite -- very much in
2 evidence, I would say.

3 CHAIRMAN RAY: The Tribunal will take official
4 notice of the 1985 Broadcasting Yearbook, radio yearbook,
5 as well as the '82 and '83, if it's available to us. How-
6 ever, the Tribunal overrules the objection.

7 BY MR. EISEN:

8 Q With regard to your random sample of radio
9 stations and the hours it compiled --

10 CHAIRMAN RAY: Excuse me, sir. One other comment.
11 If it is at all possible for the societies to deduce from
12 the survey any information as to the number of Hispanic
13 radio stations, we would appreciate if you would do so and
14 provide that information both to counsel and the Tribunal.

15 MR. EISEN: Thank you.

16 BY MR. EISEN:

17 Q In addition to the random samples of broadcast
18 stations that you state were conducted during the course
19 of the survey, was there any reference to program logs of
20 radio stations?

21 A We do not, in the normal course, use program logs
22 of radio stations. We take our information by tape. To
23 the extent that we may have difficulty in identifying a
24 specified number of performances on any radio tape that we
25 have, we might, in fact, write to the radio station asking

1 them for information but, in the normal course, we don't
2 get logs from radio stations.

3 One caveat to that, we do get some program guides
4 from some stations which are generally generically known
5 as classical music stations, but otherwise we do not. We
6 take it all from tape.

7 Q Can you also tell me how you would gather informa-
8 tion on media other than radio stations, to accomplish the
9 survey that you've been testifying to?

10 A Well, our local television survey is generally
11 conducted by using a combination of TV Guide and cue sheet.
12 We also make audio tapes of stations that are catchable,
13 hearable, from our 20-some-odd district offices.

14 Our network television survey is based primarily
15 on cue sheets that we get from program producers and logs
16 that we get from the networks for network-produced shows.
17 We supplement that by taking both audio and video tapes
18 of the networks as a method of checking on the accuracy
19 of the information we were getting in the form of cue
20 sheets and logs and, in fact, in the normal course, we will
21 take one week every quarter just as a general principle,
22 plus we do taping where we feel it is otherwise called for.

23 In the case of background music services, such
24 as Muzak, et cetera, we use information supplied to us by
25 the services of what new product is being sent out to their

1 licensees. In the case of so-called serious concert per-
2 formances and performances in colleges and universities,
3 we use printed programs of the kind that you see when you
4 go to a concert. In the case of our airline survey, we
5 use the airline magazines -- again, like you have seen
6 when you take a plane, you flip to the back, decide what
7 you want to listen to -- we have the same information
8 available to us.

9 Q For these activities that you've just enumerated,
10 were they done in this survey, to reach those conclusions
11 that you reach at paragraph 2 of Section II of your state-
12 ment?

13 A Our analysis there was broadcasts and background
14 music service performances.

15 Q Just background music and broadcasts?

16 A Radio, television both local and network, and
17 wire music services.

18 Q Where were these surveys accomplished -- that is,
19 the local media that you referred to? What local media?

20 A I think you lost me on the question. You mean
21 what stations?

22 Q Stations; if we're dealing with Muzak, the local-
23 ities of the Muzak that you tested; if you're talking about
24 concerts -- and I'm not sure whether you are or not --
25 where were the concerts conducted, or where was the

1 information gotten from for the concerts?

2 A I'm not talking about concerts. The broadcast
3 survey information is from all over the United States.
4 What we did was simply look at our 1982 and 1983 survey
5 results, so that is essentially across the United States.

6 In the case of the background music services,
7 it's based from information that we get from their central
8 offices, about what they have sent into the field.

9 Q But the 60,000 hours of broadcast time apparently
10 were compiled from many different communities in many dif-
11 ferent localities, is that right?

12 A The 90,000 hours, which is the 60,000 of radio
13 and the 30,000 of television, local television, is from
14 across the United States, yes, and Puerto Rico.

15 Q And would you know what percentage of those hours
16 were compiled in communities with high Hispanic populations?

17 A No, I do not.

18 Q You mention in your testimony that you undertook
19 two chart analyses. One analysis was based on Billboard
20 charts in 1982 and 1983, is that correct?

21 A Correct.

22 Q Who actually did that analysis?

23 A Well, the Billboard chart analysis is done in
24 the regular course of business, by people who are on my
25 staff. So, we looked back at something we'd already done.

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1 Q By the way, how many people do you have on your
2 staff?

3 A Well, directly and indirectly, I think it's
4 somewhere between 2- and 300.

5 Q What do you mean by indirectly?

6 A Well, I mean people -- clerks in departments,
7 who report to managers, or supervisors who report to
8 managers who report to me.

9 Q Who is it that actually compiled the information
10 that went into your conclusions in Section II?

11 A On the Billboard -- one of the people who is
12 directly on my executive staff.

13 Q And when was that information compiled?

14 A Compiled week-by-week during the year.

15 Q We touched on this a little earlier, and I'd
16 like to know, again, why it was that you didn't include
17 within your direct statement, the charts in Billboard
18 magazine referred to as Hot Latin LPs.

19 A I think the basic problem with them is that they
20 are variable in the sense that they don't come out every
21 week, that they don't come out for the same community
22 each time so that you may have one week you have one city
23 and another week you may have another city. They -- and
24 the other problem with them is that they are, in fact,
25 LP charts, so they tell you what Latin albums are selling,

1 but that doesn't tell you what individual Latin songs on
2 those albums are being played. So, I think that's basically
3 why we didn't.

4 Q But would you agree that the Hot Latin LP charts
5 in Billboard magazine could be broken down to show what
6 45 RPM records came from the full long-playing album?

7 A Well, let me answer you this way. We also don't
8 analyze the LP charts, the Billboard LP charts. I suppose,
9 if we had a world enough in time, we could do that kind
10 of analysis, but it does mean chasing down an awful lot
11 of information that --

12 Q But you did do it in this case, is that correct?

13 MR. KOENIGSBERG: Mr. Chairman, again, I must
14 ask counsel -- I know he's eager to ask questions, but
15 I must ask him to let the witness finish answering before
16 he starts another question.

17 MR. EISEN: I thought the witness had answered,
18 but I certainly apologize.

19 THE WITNESS: I paused to reflect.

20 MR. EISEN: That's why I asked the question.

21 THE WITNESS: There are 10 to 12 titles on an
22 album. Generally speaking, not every cut on an album is
23 released as a single, and an awful lot of work would have
24 to be done in order to determine which one gets released
25 as a single.

1 BY MR. EISEN:

2 Q What kind of work, Mr. Adler?

3 A Well, one thing, of course, you might have to do
4 is go to the various record companies and ask them. You
5 might have to then check the retail outlets to see if the
6 individual cuts, any of them have been released as a
7 single.

8 Q But, again, you didn't do that in this survey?

9 A No, we didn't.

10 Q By the way, do you know whether Replay surveys
11 Hispanic music?

12 A I do not know whether they do. I know that these
13 were the only charts that we had for Replay.

14 MR. EISEN: Thank you. That's all I have for
15 this witness.

16 CHAIRMAN RAY: Mr. Koenigsberg?

17 MR. KOENIGSBERG: I've got some redirect, Mr.
18 Chairman. I don't know whether you want to take a break
19 now or not.

20 CHAIRMAN RAY: Unless the witness would like to
21 take a break at this point, I'd like to proceed so we can
22 finish today.

23 THE WITNESS: At your disposal.

24 CHAIRMAN RAY: It's up to counsel. Do you want
25 a break?

1 MR. KOENIGSBERG: Well, I think it would be wise.
2 I'm getting a little tired.

3 CHAIRMAN RAY: Ten minutes break.

4 (Whereupon, a short recess was taken.)

5 CHAIRMAN RAY: Back on the record. Mr. Koenigs-
6 berg?

7 REDIRECT EXAMINATION

8 BY MR. KOENIGSBERG:

9 Q Mr. Adler, let's turn to Chairman Ray's question
10 to you about foreign publishers and American sub-publishers.
11 You indicated how performing right organizations paid money
12 to foreign publishers through such arrangements, but you
13 did not indicate how foreign writers got paid, and to com-
14 plete the picture for the Tribunal, I wonder if you would
15 do so.

16 A Yes. The societies -- ASCAP, BMI and SESAC, too,
17 for that matter, would remit to the society of the originat-
18 ing foreign writer that share of the royalties that were
19 due him or her for the work picked up in the survey, so
20 that money would go to the foreign society directly --

21 CHAIRMAN RAY: Even though there may be an American
22 sub-publisher?

23 THE WITNESS: Absolutely. And then the foreign
24 society would, in turn, pass that money through to its
25 writer member.

1 BY MR. KOENIGSBERG:

2 Q Let's turn to some questions that Mr. Eisen
3 raised about the utility of the ASCAP survey in this pro-
4 ceeding. Was anything special done to the survey to put in
5 or take out Spanish-language radio stations in doing the
6 analysis of Latin American works?

7 A No. Just to make it abundantly clear, what we
8 did was to look back at the results of the survey already
9 conducted, upon which our distributions had already been
10 made, in order to see what those results actually showed
11 us, specifically with respect to these particular Latin
12 American music titles, but we just looked at the result
13 of that ongoing survey in order to come up with this in-
14 formation, that survey we have used as the basis for dis-
15 tributing \$1.5 billion over the years since it went into
16 effect.

17 CHAIRMAN RAY: Let me ask one question regarding
18 this -- and I might add here, we will try to avoid doing
19 so, but if I ask a question at this point, at this stage,
20 that opens up a new area completely, since there is no
21 rebuttal -- just, again, Mr. Eisen, to show how flexible
22 we can be -- I will permit you a question on it also, if
23 you choose.

24 MR. EISEN: Thank you, Mr. Chairman.

25 CHAIRMAN RAY: I don't think this is the kind of

1 question that will require that kind of thing but, for my
2 own information, do you know, off the top of your head,
3 without any data before you, whether royalties paid to
4 Latin -- either publishers or societies -- have increased
5 since 1982, to 1985?

6 THE WITNESS: I can't answer that off the top
7 of my head.

8 CHAIRMAN RAY: Thank you.

9 BY MR. KOENIGSBERG:

10 Q What can you tell the Tribunal about the repre-
11 sentation of Spanish-language radio stations in the ASCAP
12 surveys in 1982 and 1983?

13 A Spanish-language stations were represented in
14 the survey, in the normal course, in proportion to their
15 licensees, in the same way that any other radio station
16 and any other kind of format would have been represented.

17 Q Mr. Eisen asked you to help what the definition
18 of what a performing right society is, and you listed a
19 number of characteristics. I wonder if there are other
20 characteristics that you have in mind that you would like
21 to tell the Tribunal would meet that definition as well.

22 MR. EISEN: I object. What the witness said
23 earlier is clearly a conclusion without any basis on any-
24 thing except his own views on what a performing right
25 society is. He ticked off probably a half-dozen different

1 factors that he thought were included in the definition of
2 a performing right society, none of which are included in
3 the statutory definition. What good does it do to try to
4 elicit further information on what he thinks a performing
5 right society is supposed to do? Either we meet the
6 statutory definition or we don't.

7 MR. KOENIGSBERG: Mr. Chairman, I think it help-
8 ful for the Tribunal to know what generally accepted norms
9 for performing right societies are. The statutory defini-
10 tion talks of -- and we can read it into the record --
11 116(e)(3) -- the statutory definition says, "A performing
12 right society is an association or corporation that licenses
13 the public performance of non-dramatic musical works on
14 behalf of the copyright owners, such as the American Society
15 of Composers, Authors and Publishers, Broadcast Music, Inc.
16 and SESAC, Inc."

17 Now, I would submit to you, Mr. Chairman, that
18 it was well within the knowledge of Congress as to what
19 a performing right society was when it wrote that defini-
20 tion, that the generally accepted understanding of what
21 those terms mean in the music industry is something that
22 Mr. Adler is qualified, given his expertise, to tell you
23 about, and I think, therefore, that it is most relevant
24 that he does share that knowledge with you.

25 And I would, lastly, add that I'm asking this

1 question on redirect because Mr. Eisen asked it on cross.
2 If he had not asked it on cross, I would not have a right
3 to ask it on redirect, but since he did, I do as well.

4 MR. EISEN: No, there's a difference. The
5 witness answered my questions on direct, and now we have
6 a question that's pending on what is purporting to be
7 redirect, what else is there, in addition to what you've
8 answered. That's not the same as simply opening up an
9 area after a question has been asked on cross-examination.
10 He's been responsive to that, and if counsel wants to ask
11 him questions about the answer that he gave, the specific
12 matters that he raised in his answer, I have no objection
13 to that, but to go beyond that is to go beyond the scope
14 of the cross-examination, and I think it's improper for
15 redirect.

16 Secondly, the key language, I think, in the
17 statute, happens to be "such as" ASCAP, BMI and SESAC
18 when defining what a performing right society is. As far
19 as I'm concerned, and I believe, I think, as far as Congress
20 is concerned, I would hope as far as the Tribunal is con-
21 cerned, there is no generally accepted roster of ingredients
22 that a performing right society has to have. And so I
23 would renew my objection and say that the answer has already
24 been given in response to the question, and it doesn't
25 further the record to go beyond that.

1 CHAIRMAN RAY: The Tribunal sustains the objec-
2 tion on the basis of how the question was worded.

3 MR. EISEN: Thank you.

4 BY MR. KOENIGSBERG:

5 Q Mr. Adler, Mr. Eisen asked you if the factors
6 that you had enumerated were your own definition of a per-
7 forming right society. On reflection, I would ask you
8 what is your answer to that question?

9 MR. EISEN: Objection. He's already given the
10 answer. It's in the record. Why is he being asked to
11 reflect on it again?

12 MR. KOENIGSBERG: I'm asking him to reflect on
13 it again so that we can supplement the answer and give it
14 to the Tribunal in the fullest possible form. I believe
15 this is information, Mr. Chairman, that you should have
16 in the fullest possible form.

17 MR. EISEN: I'm sorry, it's improper redirect
18 examination, and it's not going to do any good anyway, to
19 give the idea of what generally accepted practices are,
20 from this witness.

21 CHAIRMAN RAY: Again, the Tribunal sustains the
22 objection. We have in the record the answer already.

23 BY MR. KOENIGSBERG:

24 Q Mr. Adler, let me ask you this. Is a music
25 publisher a performing right society, in your view?

1 of factors. Performing right societies don't deal with
2 their members or affiliates on that basis, they deal from
3 the standpoint of having generally known accepted rules
4 that govern the relationships between them all. They have
5 a series of rules that govern the way distributions are
6 made and those are going to be the same for all. They
7 are not going to have -- the nature of the relationship
8 is vastly different.

9 CHAIRMAN RAY: In your opinion, can a music
10 publishing company legally be a performing right society?

11 THE WITNESS: Well, you know, there is -- let
12 me try to carefully phrase this because when we talk about
13 what is a performing right society, when I talk about what
14 a performing right society is, I talk about it -- I think
15 I gave an answer earlier that is an answer that I elaborate
16 on now, that any professional in the field would give you
17 as an answer, and do I think legally, that covers an
18 awfully wide range, I think. I think there are an awful
19 lot of things that are incompatible between being a
20 publisher and being a performing right society.

21 CHAIRMAN RAY: Thank you. Any questions?

22 COMMISSIONER AGUERO: No questions.

23 CHAIRMAN RAY: Thank you very much, Mr. Adler,
24 for appearing before us.

25 (Whereupon, the witness was excused.)

1 MR. DUNCAN: I'd like to call Mr. Allen H. Smith,
2 please.

3 CHAIRMAN RAY: Mr. Smith, I'd like to thank you
4 for coming and testifying before us today.
5 Whereupon,

6 ALLEN H. SMITH
7 was called as a witness and, having first been duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. DUNCAN:

11 Q Mr. Smith, for the record, would you state your
12 name, please?

13 A Allen H. Smith.

14 Q And what is your occupation, position and title?

15 A I am currently Vice President of Administration
16 for Broadcast Music, Inc., BMI.

17 Q And would you state briefly your background.
18 First, let me ask you, do you have a copy before you of
19 a document entitled Direct Testimony of Allen H. Smith?

20 A I do.

21 Q Was that prepared by you or under your super-
22 vision?

23 A Certainly, under my supervision, in concert with
24 counsel.

25 Q State your background and qualifications, please.

1 A Well, I've been Vice President of Administration
2 since 1982. From 1977 until 1982, I was Vice President
3 of Licensing at BMI. I joined BMI in 1976 as Director of
4 Special Projects. Prior to that, I had been with National
5 Broadcasting Company for about 25 years. During the last
6 six or seven years of that time, I was with NBC News Elec-
7 tions. I directed their technical projects and was inti-
8 mately involved in all their dataprocessing, electronic
9 dataprocessing. Fourteen years prior to that, for the
10 14 years prior to that, I was a writer, then managing
11 editor and then associate producer of the Today Show. I
12 was also writer-producer for a number of the network
13 specials.

14 Q Would you summarize the purpose of your testimony
15 today?

16 A Well, first, I would explain how we developed a
17 representative sample of the most performed Spanish-language
18 songs in our catalog, as requested by the Tribunal. This
19 sample, which was consolidated with the ASCAP sample, was
20 submitted to the Tribunal on August 9, 1985, which we
21 incorporate by reference.

22 Secondly, I'll describe BMI's analysis of the
23 songs submitted by the Latin American Music Claimants in
24 its filing of August 7, 1985, which we performed to deter-
25 mine which songs, if any, were in the BMI repertoire, and

1 the amount of royalties, if any, would have been paid by
2 BMI for any or all of the titles if they had been within
3 our repertoire.

4 Q Going back to the representative sample portion
5 of your testimony, was not the BMI sample consolidated also
6 with SESAC's sample?

7 A It was consolidated with the ASCAP sample and
8 SESAC, yes.

9 CHAIRMAN RAY: Mr. Duncan, at this point, perhaps
10 if there is any voir dire?

11 MR. EISEN: No, counsel can go on with his direct,
12 Mr. Chairman.

13 BY MR. DUNCAN:

14 Q Turning now to the representative sample, Mr.
15 Smith, would you describe that?

16 A Prior to our August 9 filing, we requested that
17 our Research Department prepare a list of the most performed
18 Spanish-language songs in the BMI repertoire. Initially,
19 they examined our list of songs credited in our logs with
20 a million or more performances, broadcast station per-
21 formances. Let me parenthetically add that a million
22 performances, if you assume three minutes per performance,
23 amounts to nearly six years of playing, without a break.

24 Anyway, the Research Department then supplemented
25 that list, added certain other well known standards. They

1 next went to our computer or database, more precisely, to
2 verify the names of the writers and publishers of these
3 songs, and that any song was still currently within our
4 repertoire.

5 I mentioned the database before. The information
6 on all songs within our repertoire is fed and maintained
7 in a computerized database. It is derived from clearance
8 forms submitted to us by affiliated writers and publishers,
9 and is continually updated with new information furnished
10 by affiliates, such as change of name, new pseudonyms,
11 addresses, other pertinent data. So, the list that is
12 submitted is, to the best of my knowledge, current and
13 accurate.

14 Q Now move on to the next part, the repertoire
15 of LAM and what you did with that?

16 A In the letter of August 7, LAM submitted to
17 the Tribunal an alleged representative sample of the most
18 performed Spanish-language songs in its catalog, and we
19 then analyzed that listing of songs to determine which,
20 if any, were in our repertoire and the amount of money that
21 they would have earned, the amount of money that any would
22 have earned if they had been in our repertoire and would
23 have been paid by us.

24 First of all, in checking the songs claimed by
25 LAM, our Research Department found that two of those

1 listed were, in fact, also in the BMI repertoire. Those
2 songs are -- forgive me if I mispronounce -- Cerueza,
3 Humo y Licor and Negando su idioma. I believe copies of
4 the clearance forms are annexed as exhibits. The balance
5 of the list, minus the songs in the ASCAP repertoire, were
6 submitted to our research people to determine the approxi-
7 mate amount of royalties, if any, that would have been paid
8 to a writer or publisher affiliate, by BMI, for those songs
9 if they had, indeed, been within our repertoire.

10 Now, this process involves our logging and dis-
11 tribution system, and that's contained in one of our earlier
12 filings, but to highlight a couple of things, our distri-
13 bution, or our logging system is a system of logging
14 primarily broadcast performances.

15 On a sample basis, we cycle through the entire
16 radio universe once annually, for a total of something on
17 the order of 360- to 400,000 hours of radio performances
18 per year that come into us in log form. Television, we
19 have two arrangements there. One is a census where, through
20 an arrangement with people who have an arrangement with
21 TV Guide, we, in effect, get the TV Guide data in machine-
22 readable form so it runs through our computers, and that
23 amounts to probably something on the order of 5- to 6 million
24 broadcast hours a year are analyzed through the computer,
25 and then there is additionally a small sample, an ongoing

1 sample of television stations for the purely local material.
2 I say local, as opposed to network or syndicated, but that
3 which is produced locally by the stations. That amounts
4 to something like \$10,000 a year.

5 Now, this performance data comes into us and as
6 an initial part of our processing, there is a listing that
7 is produced of all the performance data that has arrived
8 inhouse. This listing we call alpha books because it is
9 in alphabetical sequence. These alpha books can be analyzed
10 after the fact, since they contain all of the raw data, can
11 be analyzed after the fact, to provide both BMI and non-BMI
12 information, and this was what we did for the 1982 and 1983
13 performances of songs claimed by the Latin American
14 Claimants.

15 Then after pulling this information, the research
16 people will calculate a payment rate based on a payment
17 schedule.

18 Q What did it show?

19 A The results of what they would have earned are
20 listed song-by-song in Exhibit C to the comments of ASCAP,
21 BMI and SESAC filed on September 3, 1985, which we incor-
22 porate by reference.

23 Basically, of the 179 titles listed by LAM, only
24 40, or 22.35 percent, would have had any earnings in 1982,
25 and only 38, or 21.23 percent, would have had any earnings

1 in 1983.

2 It should also be noted that the only performances
3 we found within any of our alpha books, of LAM works,
4 occurred only in radio, no other medium. So, if the
5 earnings of Latin American works had been part of BMI's
6 distribution for 1982, they would have accounted for
7 .002517 percent of our total distribution for all U.S.
8 performances, and if we apply this percentage to the amount
9 of \$1,453,770, that represents the hypothetical 50 percent
10 share for BMI of the total jukebox royalty fee for 1982,
11 LAM would be entitled to \$36.60 as its share of the 1982
12 fund, and using the same method for 1983, LAM's earnings
13 would have accounted for .003319 percent of our total
14 distribution for all U.S. performances and, again, applying
15 this percentage to a similar hypothetical 50 percent
16 which, in this case, would be \$1,431,352, LAM would be
17 entitled to \$47.50 as its share of the 1983 fund.

18 Q What about the cost of surveys? I think you've
19 had some experience with that. Would you comment on that
20 and share your thoughts with the Tribunal?

21 A Yes. LAM has argued that the only fair method
22 of evaluating is a scientifically valid joint survey. My
23 understanding is, however, that they have refused to pay
24 for such a survey, so this would place the financial burden
25 on the shoulders of ASCAP, BMI and SESAC and we'd be forced

1 to foot a significant bill to provide to prove what we
2 believe to be a miniscule amount, entitlement to a miniscule
3 amount, but the cost of the survey that we conducted in
4 1979 in a jukebox royalty distribution was well over
5 \$50,000.

6 We spent approximately \$50,000 to collect just
7 the raw data, and that doesn't include any of the other
8 expenses -- tabulating, analyzing, the machine time, some
9 of which was done inhouse, some of which was done out-of-
10 house -- so if these costs are included -- and survey costs,
11 generally, since 1979, have been considered -- we think
12 the cost of any jukebox survey today would clearly outweigh
13 the value of the kind of award that could be granted in
14 this instance.

15 Q And how would you, in conclusion, summarize what
16 you have just testified?

17 A Well, we feel that we've demonstrated the value
18 of LAM's repertoire can be reliably established using the
19 BMI and ASCAP surveys. Both BMI and ASCAP have already
20 submitted information on which the Tribunal can conclude
21 that the surveys are completely accurate and impartial,
22 and the use of these surveys obviates, in our view, the
23 need to impose upon us the burden of performing a costly
24 field survey.

25 The results of the surveys performed by ASCAP

1 and BMI demonstrate conclusively, in our view, that Latin
2 American Claimants are entitled to, at most, a de minimis
3 award from 1982 and 1983 jukebox funds. We shall prove
4 that ASCAP, BMI and SESAC are entitled to all the 1982 and
5 '83 jukebox royalties except for all agreed upon settlement
6 amounts to the Italian Book Corporation and, at the most,
7 a few hundred dollars to Latin American Claimants.

8 MR. DUNCAN: Thank you very much, Mr. Smith, I
9 have no further questions.

10 EXAMINATION BY THE TRIBUNAL

11 BY CHAIRMAN RAY:

12 Q As an expert in the industry for many years,
13 in your opinion, what does an entity have to do, or how
14 would you describe an entity becoming a performing society?

15 A In my view, sir, it has to adequately represent
16 its members, affiliates, to have sufficient licenses or
17 source of income out there so it is collecting money from
18 all of the places that are using its affiliate's music.
19 It must also have the resources to track that music use
20 properly, and an ongoing mechanism for equitably distribut-
21 ing this.

22 Q Again, in your opinion, are there any performing
23 societies, to your knowledge, other than BMI, SESAC or
24 ASCAP, in the U.S.A.?

25 A Not to my knowledge, no, sir.

1 Q How do you reach that conclusion?

2 A Simply because I have not encountered them, sir,
3 anywhere.

4 CHAIRMAN RAY: For the time being, that's all.
5 Mr. Eisen?

6 CROSS-EXAMINATION

7 BY MR. EISEN:

8 Q Just a few questions, Mr. Smith. Your testimony
9 is that you haven't encountered other entities that qualified
10 in your definition as a performing right society, is that
11 correct?

12 A That's correct.

13 Q That is not to say that there are no other
14 performing right societies that exist?

15 A That's correct.

16 Q With regard to your testimony at page 3, can you
17 tell me how it was that you established that the songs that
18 were a part of your survey were, in fact, in BMI's
19 repertoire?

20 A Forgive me, I don't fully understand the question.
21 You said the songs that are in our survey?

22 Q You found a certain number of songs that you state
23 were in BMI's repertoire, during the course of this study,
24 is that right?

25 A Are you speaking of the songs that were submitted

1 to usby the Latin American Claimants or in total?

2 Q In total.

3 A Very simply, they are run through our database.
4 There is a computer that goes on as well as a human match.

5 Q What kind of information is placed into the
6 database?

7 A Title, writer, publisher, as well as other
8 information, but that's the information that is used for
9 identification -- title, writer and publisher.

10 Q Did the database that you used in this survey
11 relate to songs in BMI's 1982-1983 repertoire?

12 A Yes, sir.

13 Q Were there any other songs that were placed
14 into the database that went beyond the 1982-1983 reper-
15 toire?

16 A There are titles that are presently within our
17 database that are -- that may or may not have been in there
18 since 1982 and 1983, however, there is information that
19 exists also in the database that indicates when a title
20 came in and it's clear.

21 Q Do you know how many of the titles that were
22 used come from the 1982-1983 performances?

23 A We only looked at 1982 and 1983 alpha books.
24 They are segregated by year.

25

1 Q So when the database spit out whatever data it
2 was that you were trying to access, you were able to break
3 out those songs that went beyond 1982 and 1983?

4 A What we looked at, sir, again, within the alpha
5 books, we went back to the 1982 alpha book, and it's a
6 matter of re-examining that which has already been done.
7 We knew which titles were BMI's in 1982 because we'd already
8 made a distribution on that. That had been done with the
9 1982 distribution, and similarly for 1983. So, it was
10 simply a matter of re-examining that. And then also looking
11 to see whether or not any of the 170-odd titles that Latin
12 American Claimants had provided us appeared within these
13 alpha books.

14 Q In your experience, can a song be in the reper-
15 toires of more than one performing right society?

16 A In the cases of joint authorship, yes, but 100
17 percent of a title cannot be in the repertoire of any more
18 than one organization at one time. By that I mean that
19 there are instances where BMI and ASCAP -- well, one of
20 the titles referenced earlier, Julio Iglesias, the popular
21 song there is actually a song that was written by Hal David
22 of ASCAP and Willie Nelson of BMI. It would appear in
23 both of our repertoires, but only for the appropriate
24 percentage that each copyright holder has.

25 Q Well, for instance, you mentioned, I believe, two

1 song titles that you found within a list submitted by
2 ACEMLA that you believed were in BMI's repertoire, is that
3 right?

4 A And they are indicated in our database as being
5 100 percent. We pay 100 percent royalties for these
6 titles.

7 Q Does the data that enables you to reach that
8 conclusion come from the Copyright Office?

9 A It comes from the publisher, generally.

10 Q So, you don't know whether there's any agreements
11 that have been filed with any governmental agency that
12 might differ with your conclusion?

13 A I do not.

14 Q I believe you stated that your representative
15 sample was based upon broadcast station performances, is
16 that right?

17 A That's correct.

18 Q Do you know what number of stations that were
19 surveyed in this representative sample were Spanish-language
20 stations?

21 A If I could answer that slightly indirectly. Since
22 our sample within a calendar year, samples all stations
23 within the broadcast universe, all commercial stations in
24 both the continental United States and Puerto Rico are
25 requested to log within a 12-month period, the answer would

1 be however many exist in the Broadcasting Yearbook listing,
2 or however many actually exist, that's what would have
3 been in the sample.

4 Q But you didn't specifically address those
5 Spanish-language radio or television stations within this
6 universe, to derive the information that you were able to
7 include in your statement?

8 A No. The format is transparent to the sample,
9 and the sample, within a year, covers every format, a look
10 at every station.

11 Q But it's a universal random sample, is that
12 right? It doesn't relate specifically to any segment of
13 the broadcasting community that might be expected to
14 program Spanish-language programming more heavily than
15 others?

16 A That's correct.

17 Q You also mentioned, and please clarify this if
18 you will, that this representative sample that you con-
19 ducted was supplemented. Can you tell me what you mean by
20 that?

21 A No, I'm sorry, I think you misunderstood something
22 that I said. The list of most performed titles, BMI list-
23 ing of most performed titles was the one that was supple-
24 mented. The Research Department first started with those
25 titles that had reached a million performances or better,

1 in at least one instance 3 million performances out there.
2 Below that, they supplemented that from personal knowledge
3 of some of the standards, but that's where the supplementa-
4 tion came in.

5 Q I think you also testified that you found that
6 only 40 ACEMLA titles would have had any credit earnings,
7 is that correct?

8 A I believe that was the number.

9 Q Again, your survey did not take into consideration
10 performances that were specifically derived from jukebox
11 play, is that right?

12 A It is our belief -- and this has been testified
13 to by representatives of the jukebox industry in previous
14 hearings before the Tribunal -- that the broadcast universe
15 is, indeed, an analog to jukebox and is representative
16 of what takes place in jukebox.

17 Q But, again, your survey, that survey conducted
18 by BMI pursuant to this proceeding, didn't take into con-
19 sideration jukebox play?

20 A It did not look specifically at jukebox, that
21 is correct.

22 MR. EISEN: The only other thing I would request
23 at this time, Mr. Chairman, is, like the other parties
24 to this proceeding, if it is possible to have those under-
25 lying documents within a reasonable amount of time, I think

1 underlying documentation of the '82 and '83 BMI radio
2 surveys to be provided for the record and, if it is not
3 provided, for the entire evidence presented by Mr. Smith
4 to be stricken, the motion is denied.

5 MR. EISEN: I acknowledge your ruling, and
6 counsel's concern, I acknowledge that, too. I would like
7 to ask counsel whether or not it's possible to submit
8 documents that while not in toto covering your survey,
9 could be broken down in some reasonably understandable
10 form, to show what the sources of the survey results were?

11 MR. DUNCAN: I believe, Mr. Chairman, in a joint
12 submission, both ASCAP adn BMI, in response to the Tri-
13 bunal's letter of May 16, each described in some detail
14 how the respective distribution systems work. In the
15 case of ASCAP, the consent judgment was appended, the 1960
16 order of the court, and in the case of BMI, a document,
17 I believe, entitled -- I'm sorry -- ASCAP also had the
18 ASCAP survey and royalties, and BMI had one entitled Where
19 The Money Goes, I believe, all appended. All those docu-
20 ments describe how each survey is conducted, and how
21 affiliates and members funds are distributed, and I don't
22 know what additional information counsel is seeking.

23 MR. EISEN: All right. I don't want to place
24 any onerous burden on the Tribunal, the record, counsel or
25 for myself, but perhaps we can narrow this even further.

1 I would request that I be provided with at least that
2 documentation which shows what broadcast outlets were part
3 of the survey.

4 MR. DUNCAN: I think the witness has already
5 testified that at least as to BMI, every station in the
6 country, every station.

7 MR. EISEN: Yes, you did testify, you are abso-
8 lutely right. Well, the problem I'm having is, voluminous
9 aside, and I recognize the difficulty that the Tribunal
10 and counsel have with that, other surveys that have been
11 presented in this proceeding up till this time have been
12 supported by the underlying documents, or at least the Tri-
13 bunal has acknowledged that the documents exist and should
14 be provided --

15 CHAIRMAN RAY: But may I point out, Mr. Eisen,
16 in many instances, that has not been the case, especially
17 when we're talking about an entire industry, for instance,
18 during the cable royalty rate determination, it was
19 impossible for the Tribunal to get documentation as to
20 prices that were paid for syndicated programming, for
21 instance, by the broadcast stations.

22 I don't believe -- performing right societies,
23 in past proceedings, have provided us with most information
24 that we have requested and, in this case, I understand
25 the problem you're having here, I don't believe we should

1 depart from precedence here, but even if we did so, I'm
2 not sure that the parties would be able to comply, and
3 this is the reason why we denied your motion.

4 MR. EISEN: I accept your ruling, Mr. Chairman.
5 I have no further questions of this witness.

6 CHAIRMAN RAY: Mr. Duncan?

7 REDIRECT EXAMINATION

8 BY MR. DUNCAN:

9 Q Mr. Smith, you were asked on cross your use of
10 the word that you had not encountered any other performing
11 right society, and you were asked whether that was to say
12 that others might not or did not exist, do you recall that?

13 A Yes, I do.

14 Q Is your work such and is your experience such
15 in this industry that had there been any performing right
16 societies other than the three here before the Tribunal,
17 you would have encountered them?

18 A In my opinion, there is a very, very high proba-
19 bility that I would have.

20 Q If the two songs which you identified from the
21 ACEMLA list as being in your repertoire are, in fact, in
22 the BMI repertoire, and I think we have submitted as part
23 of your testimony the licensing agreement, is that correct?

24 A The clearance forms, yes.

25 Q Would that suggest to you that they were

1 improperly claimed by Latin American Music?

2 A It would suggest to me that an error has been
3 made.

4 Q And what would that error be?

5 A I think the error is on the part of Latin American
6 Music, in this instance, or on the part of the publisher
7 who has attempted to register something out there that
8 has already been registered.

9 Q And I think that you already clarified this,
10 but let me ask it again anyway. In the so-called surveys,
11 the '82 and '83 performances that you ran, I am correct
12 in understanding that your system is such that you do
13 all Spanish stations -- well, you do all stations including
14 Spanish-language stations --

15 MR. EISEN: Objection. That is a terribly leading
16 question on redirect examination.

17 MR. DUNCAN: Do you want me to try to rephrase
18 it?

19 MR. EISEN: I wish you would.

20 CHAIRMAN RAY: Would you withdraw your objection
21 if he tries to rephrase it?

22 MR. EISEN: If the next question is a proper one.

23 BY MR. DUNCAN:

24 Q Mr. Eisen asked you whether or not, in your look-
25 ing at the '82-'83 records, you paid any special attention

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1 to Spanish stations, stations which might have played
2 proportionately more Spanish songs. Do you recall that
3 question?

4 A I do.

5 Q My question to you is, did you look at such
6 stations in that survey?

7 A We looked at all stations within that survey.
8 Did we segregate this group of stations, is that what
9 you are asking?

10 Q No, I'm asking if you looked at all stations.

11 A The answer to your question is yes, we looked
12 at all stations.

13 Q So, would it be fair to say that your survey
14 results would reflect whatever was to be reflected by those
15 stations that played predominantly Spanish music?

16 A Yes.

17 MR. DUNCAN: That's all I have.

18 CHAIRMAN RAY: Mr. Smith, thanks, again, for
19 appearing before us.

20 (Whereupon, the witness was excused.)

21 MR. KOENIGSBERG: Mr. Chairman, there is one
22 final procedural matter for you that I would like to address
23 to Mr. Eisen. On Wednesday, September 18, 1985, Mr. Duncan
24 and I called Mr. Eisen in a conference call, to discuss
25 the upcoming proceedings and, in the course of that

1 telephone conversation, we asked Mr. Eisen who his witnesses
2 were going to be, after telling him who ours were going to
3 be.

4 He told us that Mr. Bernard would be a witness,
5 and that if there were any other witnesses, he would call
6 us on Monday, September 22, or Tuesday, September 23, to
7 let us know that fact. Those days came and went without
8 a call from Mr. Eisen. Therefore, we have prepared our
9 cross-examination for Wednesday, on the assumption that
10 the only witness for Mr. Eisen's client will be Mr. Bernard,
11 and I simply would like to confirm that on the record.

12 MR. EISEN: I have no comment. The day went and
13 the day passed, and you didn't get a call from me.

14 CHAIRMAN RAY: The only witness, as far as the
15 Tribunal is aware, is Mr. Bernard, and so that is true.
16 I do have a couple of items that we should at least discuss
17 briefly prior to adjourning. Number one, I would like
18 for the ASCAP and BMI counsel to comment on their request
19 today to have two counsel to cross-examine LAM.

20 MR. EISEN: I'm unaware of such a request.

21 CHAIRMAN RAY: That's exactly why I'm bringing
22 it up. It was just brought up outside, so that's why I'm
23 bringing it up here.

24 MR. KOENIGSBERG: I'm about to make the point,
25 Bruce. Mr. Chairman, as you know, ASCAP, BMI and SESAC

1 have filed a joint case here. The organizations are, as
2 you also know, very, shall we say, competitive, and what
3 we would like to do, Mr. Chairman, is to segment the cross-
4 examination of Mr. Bernard such that Mr. Duncan will con-
5 duct a defined part of it and I shall conduct the remainder
6 of it. I think we can even define the part --

7 MR. DUNCAN: Mr. Chairman, basically, I would
8 do the corporate structure, corporate existence, distribu-
9 tion system that LAM claims, and Mr. Koenigsberg would
10 examine as to the attachments, basically.

11 MR. KOENIGSBERG: In other words, Mr. Chairman,
12 Mr. Duncan will cross-examine as to Attachment 1 of Latin
13 American's case, assuming that it's part of Mr. Bernard's
14 direct testimony, and to that portion of the statement
15 that accompanied the attachments which can be found at
16 pages 2 and 3, under the heading of capital D, and also
17 capital A on page 1 of that statement.

18 MR. DUNCAN: If I could add to that, if I might
19 say as an old evidence teacher, the reason for limiting
20 cross-examination to one counsel is to avoid duplication
21 and to avoid harassing the witness. Under the proposal
22 we make, we would not duplicate and certainly neither Mr.
23 Koenigsberg nor I would ever think of harassing a witness.
24 We would suggest that no prejudice would result to either
25 counsel or to his client, from this suggestion and,

1 therefore, we formally make it.

2 CHAIRMAN RAY: Mr. Eisen, the reason I'm bringing
3 this up is because for whatever reasons, we did not adopt
4 any -- because of a lot of problems, the change in counsel,
5 et cetera, and the time element that there has to be a
6 decision made by a certain date -- as has been pointed
7 out, in the past we have been very careful not to allow
8 more than one counsel to cross because of the reasons Mr.
9 Duncan just mentioned. I would like to hear your comments
10 on this.

11 MR. EISEN: Yes. The only reason that such a
12 motion would be reasonably opposed is if it truly was
13 prejudicial. It may be somewhat extraordinary in your
14 past procedures, or the fact that there is a joint case
15 that has been put on here, for more than one counsel to
16 ask cross-examination questions, but as long as we can
17 all be certain that the questions asked are being discrete,
18 discrete in the sense that only portions of this direct
19 case are going to be covered by one attorney, there will
20 be no duplication by the other, I have no problem with that.

21 CHAIRMAN RAY: On that basis then, we will rule
22 that Mr. Duncan and Mr. Koenigsberg will cross under the
23 rules as just described.

24 The number two thing, does ASCAP or BMI intend
25 to introduce any cross-examination exhibits?

1 MR. KOENIGSBERG: Yes, sir.

2 CHAIRMAN RAY: Do you intend to have those exhibits
3 sponsored?

4 MR. KOENIGSBERG: Because, Mr. Chairman, there
5 is no rebuttal in this proceeding, I am at a loss to know
6 how to answer that question. If we had rebuttal, obviously,
7 they would be sponsored. Without rebuttal, if the Tribunal
8 would like them sponsored and we can find some way to do
9 it, we shall do it.

10 CHAIRMAN RAY: I'm going to ask Mr. Eisen for
11 his comments in a second --

12 MR. KOENIGSBERG: If I may also add, Mr. Chairman,
13 the question goes, I think, to the nature of those cross-
14 examination exhibits. Some of them --

15 CHAIRMAN RAY: As to the authenticity of those.

16 MR. KOENIGSBERG: Some of them, at a minimum,
17 there can be no question of their authenticity, for reasons
18 which will become apparent when they are introduced. I
19 simply don't want to go into why right now, but I can
20 represent to the Tribunal that for some of them, there
21 cannot be a question as to their authenticity. As for those
22 where such a question might arise, if you were to give us
23 a rebuttal period, we will put someone on.

24 MR. EISEN: I think it's premature to discuss
25 procedures on authenticity, impeachment or otherwise, until

1 the exhibit is actually introduced. At that time, I may
2 have objections. It could very well be that there would
3 be no objections, but given counsel's statement, I don't
4 think there's much room to say anything at this point.

5 CHAIRMAN RAY: Very good. Excellent. All right.
6 Then any further comments from anyone, anyone in the room?

7 (Laughter.)

8 MR. EISEN: We are going to convene again at
9 10:00 in the morning on Wednesday, is that correct?

10 CHAIRMAN RAY: That's exactly what I was going
11 to announce. We will recess until 10:00 a.m., Wednesday
12 morning, here.

13 (Whereupon, at 4:15 p.m., the hearing In the
14 Matter of CRT Dockets Numbers 83-2 and 84-283JD was ad-
15 journed, to reconvene Wednesday, October 2, 1985, at 10:00
16 a.m., in the same place.)

C E R T I F I C A T E

This is to certify that the foregoing transcript
In the matter of:

1982 and 1983 Jukebox Royalty Distribution Proceedings

Before:

Copyright Royalty Tribunal

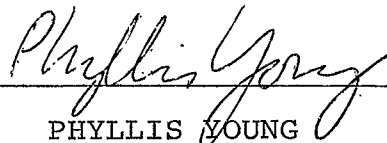
Date:

September 30, 1985

Place:

1111 20th Street, N.W.
Washington, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to type-
writing.


PHYLLIS YOUNG